Commission of Inquiry
into the Actions of Canadian Officials in Relation to Maher Arar

Policy Review

International Models of Review and Oversight of Police Forces and Security Intelligence Agencies

A Background Paper
to the Commission's
Consultation Paper

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This paper provides an overview of the review and oversight mechanisms in place for law enforcement and security intelligence agencies in eight countries: Australia, Belgium, Germany, New Zealand, Norway, Sweden, the United Kingdom and the United States. The information provided is based on preliminary research, and is subject to further examination of primary and secondary sources. Given the diversity of legal and constitutional structures, national security approaches, law enforcement and security intelligence mechanisms, review and oversight structures, language, and available resources for each country, the overview that follows varies in content.

The Commission is carrying out further research on international models. This research includes further study of the features of the national security and review/oversight structures; a review of sources which assess the utility, advantages, and disadvantages of the various review/oversight models; and a canvassing of the experience of the various foreign agencies. The Commission also looks forward to public submissions on these questions, in particular on the features and experience of foreign review agencies, whether such agencies are identified in this paper or not; and on the applicability or instructiveness of foreign models to the Canadian context.

The eight countries are discussed below in alphabetical order.

I. AUSTRALIA

a. Introduction

Australia has made extensive changes to its law enforcement, intelligence, and security structures since 9/11.[1] Its changes include the creation of the Australian Crime Commission (ACC), a body that has special powers to engage in both investigation and intelligence operations, as well as what appears to be extensive sharing of information

[1] See for example: *Anti-terrorism Act (No. 3) 2004*, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]*. For a list of legislative changes in response to September 11, see Parliament of Australia, Parliamentary Library, "Terrorism Chronology" http://www.aph.gov.au/library/intguide/law/terrorism.htm.

with other agencies.[2] Notable features of the review/oversight landscape in Australia include the Commonwealth Ombudsman, which has jurisdiction over a number of federal agencies, including the Australian Federal Police and certain intelligence agencies; and the office of the Inspector-General of Intelligence and Security, which has powers of inspection, inquiry, and complaints investigation regarding some, but not all, agencies engaged in intelligence collection.

b. Law Enforcement and Intelligence

While law enforcement is generally a State/Territory responsibility in Australia, it is the Australian Federal Police (AFP) that play the principal role in *national security* law enforcement.[3] This paper focuses on the AFP's national security activities, and the applicable review/oversight structures, but it notes certain national security activity of State/Territory forces.

Australian Federal Police

The AFP provide police services in relation to federal law and property and protection of federal interests,[4] as well as "protective services" to dignitaries and protected witnesses.[5] The AFP operate in accordance with the *Australian Federal Police Act 1979* and Ministerial Directions issued under the *Act*. The AFP's main operational units are Counter Terrorism, Border and International Network, Economic and Special Operations,

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[2] *Australian Crime Commission Act, 2002*.

[3] Australian states and territories have jurisdiction to create general criminal offences, while the federal government may create criminal offences ancillary to its jurisdiction to protect itself, its Constitution, its institutions and services and to enforce its own laws (Department of the Parliamentary Library, Information and Research Services, "Terrorism and the Law in Australia: Legislation, Commentary and Constraints," Research Paper No. 12, 2001-02, http://www.aph.gov.au/library/pubs/rp/2001-02/02rp12.pdf). Since 9/11, the federal government has legislated terrorism-related offences (see *Commonwealth Criminal Code Act 1995*, Part 5.3) pursuant to this jurisdiction, as well as a "reference of power agreement" with the States and Territories. That is, the States and Territories have "referred" their legislative powers to the federal government "to support comprehensive terrorism offences at a national level." The AFP therefore play the primary enforcement role for terrorism offences. (The Department of Prime Minister and Cabinet, "Protecting Australia Against Terrorism: Australia's National Counter-Terrorism Policy and Arrangements" (Canberra: Commonwealth of Australia, 2004) http://www.dpmc.gov.au/publications/protecting_australia/docs/protecting_australia.pdf at 18.

[4] *Australian Federal Police Act 1979*, s. 8(1).

[5] *Australian Federal Police Act 1979*, s. 8(1). The Australian Protective Service was incorporated into the AFP in July 2002.

Intelligence, Protection, and an International Deployment Group.[6] The AFP engages in intelligence collection, including in relation to counter-terrorism.[7]

The AFP's national security activities involve national and international cooperation. The AFP's Law Enforcement Cooperation Program (LECP), has liaison officers in foreign countries in order to facilitate information exchange.[8] Liaison officers in London, Washington, and Kuala Lumpur are dedicated to counter terrorism.[9] A Transnational Crime Coordination Centre (TCCC) provides national and international law enforcement agencies with a point of contact for collaboration on investigation and prevention of transnational crime, including terrorism.[10]

State/Territory police forces participate in national security activities in cooperation with the AFP. Nationally, AFP agents and their State/Territory counterparts participate on Joint Counter-Terrorism Teams (JCTTs) to investigate suspected terrorist activity, with a view to bringing criminal prosecutions.[11]

Australian Crime Commission

The Australian Crime Commission (ACC) was created in January 2003 by the *Australian Crime Commission Act 2002*. The ACC collects, analyses and disseminates criminal intelligence; undertakes intelligence operations, when authorized by its Board; investigates matters relating to federally relevant criminal activity, when authorised by its

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[6] Australian Federal Police, "A New Functional Structure for the AFP," 82 Platypus (March 2004) http://www.afp.gov.au/afp/raw/Publications/Platypus/Mar04/Functional_Model.pdf at 41.
[7] Australian Federal Police, "A New Functional Structure for the AFP," 82 Platypus (March 2004) http://www.afp.gov.au/afp/raw/Publications/Platypus/Mar04/Functional_Model.pdf at 44.
[8] Australian Federal Police, "International: Law Enforcement Cooperation Program (LECP)" http://www.afp.gov.au/afp/page/International/LawEnforcement/LECP.htm; Australian Federal Police, *AFP Annual Report 2002-2003* http://www.afp.gov.au/afp/page/Publications/AnnualReports/home.htm at 15. Indonesia and Australia also have a memorandum of Understanding regarding ongoing law enforcement collaboration to combat transnational crime and develop police cooperation: Australian Federal Police, *AFP Annual Report 2002-2003* http://www.afp.gov.au/afp/page/Publications/AnnualReports/home.htm at 30, 42.
[9] Australian Federal Police, *AFP Annual Report 2002-2003* http://www.afp.gov.au/afp/page/Publications/AnnualReports/home.htm at 15.
[10] Australian Federal Police, "Australian Federal Police Counter Terrorism Measures" http://www.afp.gov.au/afp/page/International/LawEnforcement/CounterTerrorism.htm.
[11] Australian Federal Police, *AFP Annual Report 2002-2003* http://www.afp.gov.au/afp/page/Publications/AnnualReports/home.htm at 47.

Board; provides reports and strategic criminal intelligence assessments to its Board; and advises its Board on national criminal intelligence priorities.[12] The ACC appears to have its own investigatory staff, but also participates in joint operations with the AFP and State and Territory police forces.

The ACC's Board consists of the Commissioner of the AFP (who is the Chairman), the eight State and Territory Police Commissioners, the Director General of Security, the Chair of the Australian Securities and Investments Commission, the CEO of the Australian Customs Service, and the Secretary of the Attorney-General's Department.[13] A determination by the Board that an intelligence operation is a "special operation"[14] or that an investigation is a "special investigation,"[15] permits an "examiner"[16] to exercise special powers. In particular, he or she may conduct a private examination under oath of a witness,[17] regarding the operation or investigation. An examiner may also require the provision of information by government agencies in certain cases.[18]

When the ACC obtains evidence that would be admissible in a prosecution for an offence, it must be provided to law enforcement authorities.[19] In addition, the CEO may give information to domestic or foreign law enforcement agencies,[20] other Australian government departments,[21] or the Australian Security Intelligence Organisation.[22]

Australian Security Intelligence Organisation

The functions and powers of the Australian Security Intelligence Organisation (ASIO) are defined in the *Australian Security Intelligence Organisation Act 1979*. The ASIO

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[12] *Australian Crime Commission Act 2002*, s. 7A.
[13] *Australian Crime Commission Act 2002*, s. 7B.
[14] *Australian Crime Commission Act 2002*, s. 7C(2).
[15] *Australian Crime Commission Act 2002*, s. 7C(3).
[16] Examiners are appointed by the Governor-General and must have been legal practitioners for at least five years: *Australian Crime Commission Act 2002*, s. 46B.
[17] *Australian Crime Commission Act 2002*, Division 2.
[18] *Australian Crime Commission Act 2002*, s. 20.
[19] *Australian Crime Commission Act 2002*, s. 12.
[20] *Australian Crime Commission Act 2002*, s. 59(7).
[21] *Australian Crime Commission Act 2002*, s. 59(9). The information must be relevant to the performance of the department or agency's functions, and the CEO may provide recommendations.
[22] *Australian Crime Commission Act 2002*, s. 59(11). The information must be relevant to security.

collects, correlates, and analyses "intelligence relevant to security,"[23] including foreign intelligence within Australia.[24] It also provides security assessments of individuals to government agencies, used to determine security clearances or permission to enter the country.[25]

There are statutory limits on the scope of ASIO's functions. First, it may not "carry out or enforce measures for security."[26] Second, its functions cannot limit the right to lawful advocacy, protest or dissent.[27] The Director-General of the ASIO is required to consult regularly with the Leader of the Opposition in the House of Representatives to keep him or her informed on security matters.[28]

Under warrant, the ASIO may enter premises and conduct searches, including searches of persons.[29] It may also, again under warrant, access computers to collect intelligence,[30] use listening and tracking devices,[31] and inspect postal articles.[32] Following recent legislative changes, the Director-General of the ASIO may now obtain a warrant requiring a police officer to detain someone for questioning before a prescribed authority, who must be a retired judge,[33] in order to assist the collection of intelligence relating to a

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[23] *Australian Security Intelligence Organisation Act 1979*, s. 17(1)(a)).
[24] *Australian Security Intelligence Organisation Act 1979*, s. 17(1)(e). "Security" is defined as the protection of Australia, its States and Territories, and its peoples from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference, whether directed from or committed within Australia or not; and the carrying out of Australia's responsibilities to any foreign country in relation to any of these matters: s. 4. See also See also Australian Security Intelligence Organisation, *Report to Parliament 2002-2003* (Commonwealth of Australia, 2003) http://www.asio.gov.au/Publications/Content/AnnualReport02_03/pdf/Annual_report02_03.pdf at 12.
[25] *Australian Security Intelligence Organisation Act 1979*, s. 17(1)(ca), s. 35, s. 37.
[26] *Australian Security Intelligence Organisation Act 1979*, s. 17(2).
[27] *Australian Security Intelligence Organisation Act 1979*, s. 17A.
[28] *Australian Security Intelligence Organisation Act 1979*, s. 21.
[29] Australian Security Intelligence Organisation Act 1979, s. 25, s. 25(4A). Strip searches and body cavity searches are specifically not permitted, however: s. 25(4B).
[30] *Australian Security Intelligence Organisation Act 1979*, s. 25A.
[31] *Australian Security Intelligence Organisation Act 1979*, s. 26.
[32] *Australian Security Intelligence Organisation Act 1979*, s. 27.
[33] *Australian Security Intelligence Organisation Act 1979*, s. 34B.

terrorism offence.[34] There are limits on the participation of lawyers during the questioning.[35]

Australian Secret Intelligence Service

The Australian Secret Intelligence Service (ASIS) is Australia's foreign intelligence collection agency, relying on human sources.[36] It was established in 1952,[37] but first received a legislative basis in the *Intelligence Services Act 2001*. A recent government inquiry into Australia's foreign intelligence agencies found that, in "perhaps the most substantial transition in its history," ASIS is taking on a growing role in gathering intelligence on non-state actors.[38]

ASIS may only perform its activities in the interests of "national security," "foreign relations," or "national economic well-being" to the extent that they are affected by the "capabilities, intentions or activities of people or organisations outside Australia."[39] ASIS does not have law enforcement responsibilities or "police functions,"[40] the latter being defined as arrest, charging, or detention of suspected offenders, or other activities for the purpose of prosecuting or deciding whether to prosecute, an offence.[41] However, it may communicate intelligence relevant to a serious crime to law enforcement authorities.[42] It is specifically prohibited from activities undertaken to further the interests of an Australian political organization.[43] The Director-General must regularly inform the Leader of the Opposition regarding ASIS matters.[44] Following recent

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[34] *Australian Security Intelligence Organisation Legislation Amendment (Terrorism)Act 2003; Australian Security Intelligence Organisation Act 1979*, s. 34C, s. 34D.
[35] Australian Security Intelligence Organisation Act 1979, s. 34TA, s. 34TB, s. 34U.
[36] Inspector-General of Intelligence and Security, *Annual Report 2002-2003* (Commonwealth of Australia, 2003), http://www.igis.gov.au/fs_annual.html at 27.
[37] Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 146.
[38] Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 147.
[39] *Intelligence Services Act 2001*, s. 11(1).
[40] *Intelligence Services Act 2001*, s. 11(2).
[41] *Intelligence Services Act 2001*, s. 3.
[42] *Intelligence Services Act 2001*, s. 11(2)(c).
[43] *Intelligence Services Act 2001*, s. 11(2A).
[44] *Intelligence Services Act 2001*, s. 19.

amendments, ASIS members are permitted to carry and use weapons for protection, without licence or registration.[45]

Defence Signals Directorate

The Defence Signals Directorate (DSD) is Australia's signals intelligence agency. It is situated within the Intelligence and Security Group of the Department of Defence. DSD's functions were first defined by legislation in the *Intelligence Services Act 2001*.

Like ASIS, DSD is required to perform activities only in the interests of national security, foreign relations or national economic well-being, "and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia."[46] It is not permitted to intercept communications within the domestic Australian telecommunications network.[47] It is also specified that DSD does not have police functions or law enforcement responsibilities, although, like ASIS, it may communicate intelligence relevant to serious crime to law enforcement authorities.[48] DSD cannot undertake activities to further Australian political organisations.[49] DSD is not required to consult the Leader of the Opposition.

Office of National Assessments

The Office of National Assessments (ONA) assembles "information" and produces analytical assessments regarding "international matters that are of political, strategic or economic significance to Australia,"[50] for provision to Ministers and others in government.[51] It also reviews Australia's international intelligence activities, as

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[45] *Intelligence Services Act 2001*, s. 6(4); *Intelligence Services Amendment Act 2004*, s. 2, Schedule 2.
[46] *Intelligence Services Act 2001*, s. 11(1).
[47] Inspector-General of Intelligence and Security, *Annual Report 2002-2003* (Commonwealth of Australia, 2003) http://www.igis.gov.au/fs_annual.html at 33.
[48] *Intelligence Services Act 2001*, s. 11(2).
[49] *Intelligence Service Act 2001*, s. 11(2A).
[50] *Office of National Assessments Act 1977*, No. 107, s. 5(1)(a).
[51] *Office of National Assessments Act 1977*, No. 107, s. 5(1)(b).

discussed below. ONA bases its assessments on information from a variety of sources, including secret intelligence collected by other agencies.[52]

Defence Imagery and Geospatial Organisation

The Defence Imagery and Geospatial Organisation (DIGO) acquires, produces, and distributes imagery and geospatial-based intelligence in support of Australian Defence Force and government decision-makers. It is part of the Department of Defence. It is characterized as a "single source collection and analytical agency," although it appears that its role is still somewhat in flux.[53] DIGO is not currently covered by the *Intelligence Services Act 2001*.[54]

Defence Intelligence Organisation

The Defence Intelligence Organisation (DIO) conducts foreign intelligence assessments relevant to Australian security, relying on both covertly and overtly gathered information. Unlike the Office of National Assessment, it is not a separate statutory body, but operates within the Department of Defence.[55]

c. Review, Oversight and Accountability

Australian Federal Police

Complaints regarding the AFP fall under the jurisdiction of the Commonwealth Ombudsman's office, through the *Complaints (Australian Federal Police) Act 1981*. The Ombudsman's office has jurisdiction over a number of federal agencies, including some of Australia's intelligence agencies (discussed below). The Ombudsman is notified of all but "minor" complaints against AFP members,[56] and retains oversight of investigation of

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[52] Office of National Assessments, "Corporate Plan for 2003-2006" http://www.ona.gov.au/corporate.html; Inspector-General of Intelligence and Security, *Annual Report 2002-2003* (Commonwealth of Australia, 2003) http://www.igis.gov.au/fs_annual.html> at 43.

[53] Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 142-143.

[54] Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 143.

[55] Inspector-General of Intelligence and Security, *Annual Report 2002-2003* (Commonwealth of Australia, 2003) http://www.igis.gov.au/fs_annual.html at 120.

[56] *Complaints (Australian Federal Police) Act 1981*, s. 6.

complaints by the AFP's Investigations Division. He or she may investigate complaints or oversee internal investigations, and may also identify matters for investigation on his or her own initiative.[57] The AFP Commissioner is required to ensure all relevant documents are produced to the Ombudsman, beyond which the Ombudsman also has the power to enter police premises, obtain information and documents on written notice and require persons to attend to answer questions under oath.[58] Under some circumstances, however, the Ombudsman may be prevented from requiring information or production, or from entering a particular place, by a certificate from the Attorney-General, on grounds such as public interest, security, or Cabinet privilege.[59]

Upon investigation, the Ombudsman reports to the Commissioner actions by AFP members that merit criticism, and can request further action.[60] If in the Ombudsman's view, adequate and appropriate action is not taken, he or she may inform the Prime Minister and furnish a report to Parliament.[61]

The Ombudsman must provide an annual report with particulars of complaints made during the year.[62]

The Ombudsman also inspects the AFP's records for compliance with record-keeping requirements for telecommunications interception warrants and reports on any breaches of the *Telecommunications (Interception) Act 1979* discovered in the process.[63]

The Minister may arrange for an inquiry concerning any action taken by an AFP member or any other matter relating to the AFP.[64] The inquiry may enter premises occupied by

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[57] *Complaints (Australian Federal Police) Act 1981*, s. 21A.
[58] *Complaints (Australian Federal Police) Act 1981*, s. 27, s. 29, s. 30.
[59] *Complaints (Australian Federal Police) Act 1981*, s. 27(4), s. 30(3).
[60] For example: actions that were contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, in accordance with a law that fits one of the above descriptors, based on mistake, otherwise wrong, constituting an exercise of discretion for an improper purpose or on irrelevant grounds, or followed by inadequate reasons to the complainant: *Complaints (Australian Federal Police) Act 1981*, s. 31(1). See also ss. 26(3), (3A), (3B), s. 36(1).
[61] *Complaints (Australian Federal Police) Act 1981*, s. 32, s. 33.
[62] *Complaints (Australian Federal Police) Act 1981*, s. 38.
[63] *Telecommunications (Interception) Act 1979*, s. 83.

the AFP, inspect any documents or records there, examine any property used by the AFP, and direct an AFP member to furnish information or documents or to attend to answer questions under oath.[65] The inquiry results are reported to the Minister along with any recommendations, which are not binding.[66]

A warrant for the AFP or the State/Territory police to intercept telecommunications by the AFP can only be authorized by a judge or Administrative Appeals Tribunal member.[67] The grounds vary depending on the type of offence. For terrorist offences, there must be a likelihood of assisting in investigation and a conclusion that some or all of the information sought cannot appropriately be obtained by other means.[68]

Australian Crime Commission

The Commonwealth Ombudsman also has jurisdiction over the Australian Crime Commission.[69] Its functions include the processing of complaints and investigations which it initiates of its "own motion".[70] In its latest annual report, the Ombudsman's office noted that "(o)nly six complaints were received in 2003-04 (regarding the ACC), largely reflecting the fact that the ACC's role does not bring its staff in close contact with members of the public."[71]

The *Ombudsman Act 1976* provides that where the ACC is concerned, the Ombudsman may enter into investigation "arrangements" with other bodies, including State/Territory bodies, that have the authority to investigate the ACC.[72]

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[64] *Complaints (Australian Federal Police) Act 1981*, s. 50.
[65] *Complaints (Australian Federal Police) Act 1981*, s. 50.
[66] *Complaints (Australian Federal Police) Act 1981*, s. 52.
[67] *Telecommunications (Interception) Act 1979*, s. 39(1).
[68] *Telecommunications (Interception) Act 1979*, s. 45.
[69] *Ombudsman Act 1976*.
[70] Commonwealth Ombudsman, Annual Report 2003-04, http://www.comb.gov.au/publications_information/annual_reports.htm#2003, pp. 61-62.
[71] Commonwealth Ombudsman, Annual Report 2003-04, http://www.comb.gov.au/publications_information/annual_reports.htm#2003, p. 61.
[72] *Ombudsman Act 1976*, s. 8.

An Inter-Governmental Committee consisting of a Commonwealth Minister and Ministers of each State/Territory[73] meets at least twice yearly[74] to monitor generally the work of the ACC and its Board, and their strategic direction, and to receive reports from the Board and transmit them to the represented governments.[75] Board determinations that an investigation/operation is a "special" investigation/operation must be provided to the Committee, with general information on the circumstances and purpose.[76] The Committee may request more information, which may be withheld for reasons of safety or reputation, or to protect law enforcement operations.[77] The Committee has the power to revoke the special determination, resulting in the inability of the ACC to exercise special coercive powers during the operation/investigation.[78]

The Parliamentary Joint Committee on the Australian Crime Commission consists of ten members, i.e. five from the Senate and five from the House of Representatives, appointed by their respective Houses.[79] Its duties are to "monitor and review" the ACC's functions, report to both Houses on any matter regarding the ACC to which in its opinion Parliament's attention should be directed, examine the ACC's annual reports and report to Parliament on any matter arising from an annual report, examine trends and changes in criminal activities, practices and methods and report to both Houses any change to the functions, structure, powers and procedures of the ACC which the Committee thinks desirable, and to inquire into and report to the House on any question in connection to its duties referred to it by either House of Parliament.[80] It may not reconsider the ACC's findings in relation to a particular ACC operation or investigation, however.[81] The Chair of the ACC's Board need only comply with requests for information on particular operations or investigations where he or she considers that disclosure will not prejudice

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[73] *Australian Crime Commission Act 2002*, s. 8(1).
[74] *Australian Crime Commission Act 2002*, s. 8(5).
[75] *Australian Crime Commission Act 2002*, s. 9(1).
[76] *Australian Crime Commission Act 2002*, s. 7C(4), (5).
[77] *Australian Crime Commission Act 2002*, s. 9.
[78] *Australian Crime Commission Act 2002*, s. 9(7).
[79] *Australian Crime Commission Act 2002*, s. 53(2).
[80] *Australian Crime Commission Act 2002*, s. 55(1).
[81] *Australian Crime Commission Act 2002*, s. 55(2)(b).

persons' safety or reputation or law enforcement operations.[82] On request by the Committee, the Minister must determine the question, but cannot provide reasons.[83]

Judges or magistrates may issue search warrants to be executed by AFP or State/Territory police members, as part of ACC operations or investigations, based on reasonable grounds to suspect connection with the ACC operation or investigation.[84] The ACC follows the same scheme as the AFP for telecommunications interception warrants.

The Commonwealth Ombudsman inspects compliance with reporting requirements and also with record keeping requirements under the *Telecommunications (Interception) Act 1979*.

Ministerial responsibility for intelligence agencies

The Attorney-General is responsible for the ASIO, the Minister of Foreign Affairs for ASIS, the Prime Minister for ONA, and the Minister of Defence for DSD, DIO, and DIGO.

Ministerial authorisation is required prior to ASIS and DSD activity that involves collection of intelligence on an Australian person who is overseas.[85] The Minister must be satisfied as to the necessity of the activity to the agency's functions, and the arrangements in place to ensure "nothing will be done beyond what is necessary and to ensure the reasonable nature and consequences of the activities.[86] The Minister must also be satisfied as to the nature of the Australian person's activities, for example that he or she is acting for a foreign power or involved in activities likely to be a threat to security.[87] The Ministers for both ASIS and DSD also make written rules that must be followed to protect the privacy of Australians insofar as such rules are consistent with the agencies'

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[82] *Australian Crime Commission Act 2002*, s. 59(6A), (6B).
[83] *Australian Crime Commission Act 2002*, s. 59(6C), (6D).
[84] *Australian Crime Commission Act 2002*, s. 22.
[85] *Intelligence Services Act 2001*, s. 8(1).
[86] *Intelligence Services Act 2001*, s. 9(1).
[87] *Intelligence Services Act 2001*, s. 9(1A).

performance of their functions.[88] The Minister may also give written directions for the performance of the agencies' functions.[89]

The Attorney-General exercises particular Ministerial powers under the *ASIO Act*, for example giving written guidelines to be followed in the performance of the ASIO or its Director-General.[90] The Minister is not entitled to override the Director-General concerning the nature of the ASIO's advice; however, he or she may override the Director-General in writing with reasons regarding whether collecting or communicating intelligence concerning a particular individual is justified by its relevance to security.[91] In particular, the Attorney-General is responsible for issuing warrants to ASIO, including search warrants,[92] computer access warrants,[93] warrants to use listening or tracking devices,[94] warrants to authorize inspection of mail or delivery service items,[95] and warrants to intercept domestic or foreign telecommunications.[96]

The Minister is not empowered to issue warrants for the exercise of the ASIO's special powers relating to terrorism offences (e.g. questioning, detention).[97] The issuing authority must be a judge or magistrate appointed by the Minister for that purpose, and the warrant is issued on the basis that the authority is satisfied of reasonable grounds to believe it will "substantially assist in the collection of intelligence that is important in relation to a terrorism offence."[98]

The work of the intelligence and security agencies is also guided by the National Security Committee of Cabinet, which is chaired by the Prime Minister and includes the Deputy Prime Minister, the Treasurer, and the Ministers responsible for the intelligence and

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[88] *Intelligence Services Act 2001*, s. 15.
[89] *Intelligence Services Act 2001*, s. 8(2).
[90] *Australian Security Intelligence Organisation Act 1979*, s. 8A.
[91] *Australian Security Intelligence Organisation Act 1979*, s. 8.
[92] *Australian Security Intelligence Organisation Act 1979*, s. 25(2), (4A).
[93] *Australian Security Intelligence Organisation Act 1979*, s. 25A.
[94] *Australian Security Intelligence Organisation Act 1979*, s. 26, s. 26A, s. 26C.
[95] *Australian Security Intelligence Organisation Act 1979*, s. 27, s. 27AA.
[96] *Telecommunications (Interception) Act 1979*, s. 9, s. 11A.
[97] *Australian Security Intelligence Organisation Act 1979*, s. 34C.
[98] *Australian Security Intelligence Organisation Act 1979*, s. 34D.

security agencies. It sets broad policy, priorities, and budgets.[99] The NSC meets at least monthly, and sometimes daily.[100] It is supported by the Secretaries Committee on National Security, which advises the NSC on policy, coordinates the implementation of policies and programs, and gives guidance to departments and agencies.[101]

Security Appeals Tribunal

A person may apply to the Security Appeals Tribunal for review of an adverse or qualified security assessment.[102] The Minister may also require the Tribunal to inquire and report on any question concerning a security assessment or alleged security assessment or communication of a similar nature, or matter upon which the assessment or communication was based.[103]

Office of National Assessments

The ONA is statutorily authorised to "keep under review the activities connected with international intelligence that are engaged in by Australia" and to bring to the notice of "relevant Departments and Commonwealth authorities" any "inadequacies in the nature, the extent, or the arrangements for co-ordination, of those activities" and to suggest improvements.[104] The Director-General of the ONA is required to provide an annual report to its Minister.[105] Its report examines the performance of collection and assessment agencies, and draws broad conclusions about the adequacy of their activities.[106]

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[99] Inspector-General of Intelligence and Security, "Accountability Regime," http://www.igis.gov.au/account.html.

[100] Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 52.

[101] Inspector-General of Intelligence and Security, "Accountability Regime," http://www.igis.gov.au/account.html; Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 52.

[102] *Australian Security Intelligence Organisation Act 1979*, s. 54(1).

[103] *Australian Security Intelligence Organisation Act 1979*, s. 65(1).

[104] *Office of National Assessments Act 1977*, s. 5(1)(d).

[105] *Office of National Assessments Act 1977*, s. 19.

[106] Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Government Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 56 (which observes that the terms of ONA's coordination role are unclear).

Parliamentary Joint Committees

The Parliamentary Joint Committee on ASIO, ASIS and DSD consists of seven members, three from the Senate and four from the House of Representatives, with a majority being Government members.[107] They are appointed with the aim of ensuring the Committee's composition reflects the representation of parties in Parliament.[108] Its functions are to "review" the agencies' administration and expenditure, including their annual financial statements, "review" any other matter referred to it by the responsible Minister or a resolution of either House of the Parliament, and to report its concerns and recommendations to each House of Parliament and to the responsible Minister.[109] The Committee is also required to "review" the operation, effectiveness and implications of certain post-9/11 legislative amendments by specific dates.[110] The Committee may request the responsible Minister to refer a particular matter concerning an agency to it for review, but cannot conduct a review of its own motion.[111]

The *Intelligence Services Act* specifically excludes the following areas from review by the Committee: the agencies' intelligence gathering priorities, their sources of information or other operational methods, particular operations that have been are being or are proposed to be undertaken, information provided by a foreign government unless the foreign government consents to its disclosure, any aspect of the agencies' activities that does not affect an Australian person, the rules to protect the privacy of Australians followed by agencies, or individual complaints.[112]

The Committee may request briefings from the heads of the three agencies and from the Inspector-General of Intelligence and Security, but cannot require disclosure of operationally sensitive information or information that "would or might prejudice

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[107] *Intelligence Services Act 2001*, s. 28.
[108] *Intelligence Services Act 2001*, Schedule 1, clause 14.
[109] *Intelligence Services Act 2001*, s. 29(1)(a), (b), (c).
[110] *Intelligence Services Act 2001*, s. 29(1)(ba), (bb).
[111] *Intelligence Services Act 2001*, s. 29(2).
[112] *Intelligence Services Act 2001*, s. 29(3).

Australia's national security or the conduct of Australia's foreign relations".[113] The Committee may require a person, including an agency head, to appear before it or to produce documents, based on "reasonable grounds" for believing that the person is capable of yielding relevant evidence or documents.[114] The Inspector-General of Intelligence and Security, members of his or her staff, and staff or agents of intelligence agencies are excluded.[115] A Minister responsible for an agency may issue a certificate requiring a person not to give evidence or produce documents in order to protect operationally sensitive information.[116] The Committee may take evidence under oath, and may publish or disclose any evidence or documents, unless the review was conducted in private or would result in impermissible disclosure.[117] It must give an annual report of its activities to Parliament.[118]

Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) is a statutory officer, appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.[119] The Inspector-General has statutory powers over ASIO, ASIS, DSD, and, in limited respects, DIO and ONA. Although the Inspector-General does not have statutory power related to DIGO, DIGO's Director has agreed that the Inspector-General should oversee its operations as if the *IGIS Act* had already been amended to that effect.[120]

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[113] *Intelligence Services Act 2001*, s. 30; Schedule 1, clause 1. "Operationally sensitive information" means information about sources of information, other operational assistance, operational methods, particular operations, or provided by a foreign government or an agency of a foreign government without that government's consent: *Intelligence Services Act 2001*, Schedule 1, clause 1A.
[114] *Intelligence Services Act 2001*, Schedule 1, clause 2, clause 3.
[115] *Intelligence Services Act 2001*, Schedule 1, clause 2(4).
[116] *Intelligence Services Act 2001*, Schedule 1, clause 4.
[117] *Intelligence Services Act 2001*, Schedule 1, clause 6.
[118] *Intelligence Services Act 2001*, s. 31.
[119] *Inspector-General of Intelligence and Security Act 1986*, s. 6.
[120] Inspector-General of Intelligence and Security, *Annual Report 2003-2003* (Commonwealth of Australia, 2003) http://www.igis.gov.au/fs_annual.html at 40. See also the recommendation in this regard in Australian Government Inquiry into Australian Intelligence Agencies, *Report of the Inquiry into Australian Intelligence Agencies*, Report by Philip Flood (Commonwealth of Australia, July 2004) at 59.

The Inspector-General's powers vary according to the intelligence agency in question, and include the power to address complaints, the power to hold inquiries, and the power of inspection.[121]

The Inspector-General may conduct inspections to give effect to the objects of the *IGIS Act*.[122] The Act's objects encompass ensuring compliance with the law and propriety of agency activities, the effectiveness and appropriateness of their procedures relating to legality or propriety, consistency with human rights, as well as reviewing "certain other aspects" of their activities and procedures and "certain directions given to ASIO by the Attorney-General."[123] The Inspector-General reports on the inspection to the responsible Minister of head of the relevant agency.[124]

The scope of the Inspector-General's inquiry functions varies by agency. In relation to ASIO, he or she may

- inquire at the request of the Minister, in response to a complaint, or at his or her own motion, into any matter that relates to compliance with law, propriety, effectiveness of procedures to ensure legality or propriety, compliance with Ministerial directions or guidelines, and consistency of an act or practice with human rights;
- inquire at his or her own motion or the request of the Minister into ASIO's grievance procedures for employees;
- inquire only at the request of the Minister into what if any action should be taken to protect the rights of an Australian citizen or permanent resident where an ASIO report that has been furnished to a Commonwealth agency may result in action adverse to the person's interests, and the report could not be reviewed by the

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[121] See *Intelligence Services Act 2001*, s. 8 for details.
[122] *Inspector-General of Intelligence and Security Act 1986*, s. 9A.
[123] *Inspector-General of Intelligence and Security Act 1986*, s. 4. For example, in relation to ASIO, the Inspector-General in 2002-2003 inspected warrant operations, records of operations carried out under authorities to investigate, access to and use of information from the Australian Transaction Reports and Analysis Centre and the Australian Taxation Office, provision of information to and liaison with law enforcement agencies, the official use of alternative documentation to support assumed identities, and compliance with the Archives Act: Inspector-General of Intelligence and Security, *Annual Report 2002-2003* (Commonwealth of Australia, 2003) http://www.igis.gov.au/fs_annual.html at 17.
[124] *Inspector-General of Intelligence and Security Act 1986*, s. 25A.

Security Appeals Tribunal, and in particular to inquire into whether the person should be informed of and given an opportunity to make submissions in relation to the report;

- when the Minister has given a direction to ASIO on the question, inquire into whether collection of or communication of intelligence concerning a particular individual is justified by its relevance to security.[125]

The Inspector-General's inquiry functions in relation to ASIS and DSD are similar but somewhat narrower, in that complaints must be by an Australian citizen or permanent resident in order to generate an inquiry, only the Minister may instigate an inquiry into the effectiveness and appropriateness of procedures regarding legality or propriety, and there is no provision by which to consider actions to protect the rights of or to consider whether intelligence collection/communication is justified regarding particular citizens or permanent residents.[126]

In relation to ONA and DIO, the Inspector-General may inquire of his or her own motion into consistency with human rights or procedures to redress employee grievances, but can inquire into compliance with law, propriety of activities, and effectiveness and appropriateness of procedures to ensure legality and propriety only at the Minister's request.[127] In all cases, the Inspector-General requires the Minister's approval before inquiring into a matter that occurred outside Australia.[128]

The Inspector-General may require persons to appear and examine them under oath, and require production of documents.[129] A person may not refuse to give information or produce documents on the grounds that to do so would incriminate him or her, be contrary to the public interest, or disclose legal advice given to a Minister, agency, or authority.[130] The Inspector-General may also enter agency premises after notifying the

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[125] *Inspector-General of Intelligence and Security Act 1986*, s. 8(1).
[126] *Inspector-General of Intelligence and Security Act 1986*, s. 8(2), (4).
[127] *Inspector-General of Intelligence and Security Act 1986*, s. 8(3).
[128] *Inspector-General of Intelligence and Security Act 1986*, s. 8(8)(a).
[129] *Inspector-General of Intelligence and Security Act 1986*, s. 18.
130 Inspector-General of Intelligence and Security Act 1986, s. 18(6).

head of the agency, and may access documents with a national security classification and take into his or her temporary possession.[131] The Inspector-General may be present at the questioning or taking into custody of a person under the *ASIO Act*, and may inform the authority before whom questioning takes place of any concern regarding illegality or impropriety, upon which the authority may defer questioning until satisfied that the concern has been addressed.[132] On completion of an inquiry the Inspector-General prepares a report containing conclusions and recommendations, which may include a recommendation that an individual receive compensation.[133] Recommendations are not binding, although the agency must detail any proposed action to be taken in response and, if "adequate and appropriate" action is not taken in response to the report, the Inspector-General may discuss the matter with the Minister and prepare a report for the Prime Minister.[134]

The Inspector-General is required to furnish an annual report to the Prime Minister, including comments on any inquiry regarding ASIO's collection of or communication of intelligence concerning a particular individual, comments on any inspection, and comments on ASIS and DSD's compliance with rules on the communication and retention of intelligence information.[135]

The Commonwealth Ombudsman (described above) also has jurisdiction over certain of Australia's intelligence agencies. It does not have jurisdiction over the ASIO,[136] but it does appear to have jurisdiction over the ASIS, ONA, DIGO, DIO and DSD. However, in practice, persons with complaints about these organisations have been referred to the Inspector-General.[137]

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[131] *Inspector-General of Intelligence and Security Act 1986*, s. 19(1), s. 20.
[132] *Australian Security Intelligence Organisation Act 1979*, s. 34HAB, s. 34HA.
[133] *Inspector-General of Intelligence and Security Act 1986*, s. 22(1), (2).
[134] *Inspector-General of Intelligence and Security Act 1986*, s. 24.
[135] *Inspector-General of Intelligence and Security Act 1986*, s. 35(1), (2), (2B).
[136] *Ombudsman Regulations 1977*, Regulation 4, Schedule 1. However, where a person is detained for ASIO purposes by the AFP, that person may complain to the Ombudsman.
[137] Australian Law Reform Commission, "Keeping Secrets: The Protection of Classified and Security Sensitive Information," ALRC 98, http://www.austlii.edu.au/au/other/alrc/publications/reports/98/Ch_02.html.

II. BELGIUM

a. Introduction

Belgium is a constitutional monarchy with a parliamentary system of governance. Power is separated into three branches: legislative, executive and judicial. The legislative branch – parliament (« Parlement ») – is comprised of a house of representatives and a senate (the « Chambre des Représentants » and the « Sénat »). The executive branch is formally comprised of the King and his ministers, but it is the prime minister and his or her ministers who exercise the powers of the executive branch, and who must sign legislation which has been passed by the parliament in order for it to become law. [138]

Belgium is also a federal state. Legislative jurisdiction is divided between the federal government, 10 provinces, three Regions, and three linguistic Communities.[139] It is the federal government that has legislative jurisdiction over foreign affairs, national defence and justice.[140] Its jurisdiction includes the authority to regulate law enforcement bodies and security intelligence agencies. The provinces also have a certain measure of jurisdiction over internal security matters and maintaining of the peace.[141]

The Belgian parliament recently passed legislation creating terrorism-specific offences[142], including offences specific to the financing of terrorism[143]; as well as legislation augmenting the investigative powers of the police and intelligence services.[144]

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[138] For a summary, see http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=2682.

[139] For more information, see the Belgium government's portal: http://www.belgium.be/eportal.

[140] For a summary, see http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=2679.

[141] For a summary, see http://www.belgium.be/eportal/application?origin=navigationBanner.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=2696.

[142] See parliamentary document 51K0258 (http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&rightmenu=right&cfm=flwb.cfm?lang=F&legislat=51&dossierID=0258). This legislation was passed following the European Council's Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) (http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf).

[143] See parliamentary document 51K0383 (http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&rightmenu=right&cfm=flwb.cfm?lang=F&legislat=51&dossierID=0383). This legislation was passed following the European Council's Directive of 4 December 2001 relating to terrorism financing (2001/97/CE).

A notable feature of the Belgian policing landscape is the review body to which its police forces are subject. Committee P, which has jurisdiction over all police forces in Belgium, whether local or federal, has a mandate to review both for police forces' compliance with law and respect for individual rights, as well as their effectiveness. The reports of Committee P evidence a wide scope of review, ranging from investigations into complaints from the public, to warrant review, to studies of allegations of discrimination, to studies of the effectiveness of the police forces' counter-terrorism efforts and information-sharing practices.

b. Law Enforcement and Intelligence

Policing in Belgium is generally carried out by the federal police (« *Police fédérale* ») and by a number of local police forces (« *les brigades de gendarmerie* and *les corps de la police communale* »).[145]

The *Police fédérale* are responsible for investigations affecting more than one local police zone, as well as for providing support to local police forces. The *Police fédérale* have five major divisions, including a division called the *Police judiciaire*, which carries out specific types of criminal investigations, such as investigations of drug trafficking and organised crime. The *Police fédérale* also have "special" units for certain kinds of activities and investigative techniques, and divisions in charge of liaison with foreign agencies, and with local police forces.[146]

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[144] See EU Network of Independent Experts in Fundamental Rights, "The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats" (http://www.statewatch.org/news/2003/apr/CFR-CDF.ThemComment1.pdf), pp. 27ff.

[145] For a summary, see http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=indexPage&navId=1301.

[146] All information in this paragraph is cited to http://www.polfed.be . See also the principal statute governing Belgian police forces: *Loi organisant un service de police integré structuré à deux niveaux*, dated 7 December 1998, file no. 1998-12-07/31, located at http://just.fgov.be/index_fr.htm.

The *Police judiciaire* includes a counter-terrorism headquarters, also known as *programme Terro*. This body coordinates and provides operational support and expertise to field units and other domestic and international bodies involved in counter-terrorism.[147] This includes the coordination of interaction between police units and intelligence agencies. Some local police forces also have special counter-terrorism units. Most notable of these is the Brussels police counter-terrorism division, known as the *DR3*, which comprises 6 investigative branches, and which handles "the majority" of counter-terrorism investigations in Belgium.[148] Personnel numbers at these counter-terrorism units have recently increased.[149]

Since 1984, Belgium has also had in place a *Groupe interforce antiterroriste* (GIA), which is comprised of representatives of the police and intelligence agencies, and which coordinates information exchange between these organizations. The GIA is a "crisis centre", which analyzes the ensemble of intelligence, and coordinates responses.[150]

Belgium has two intelligence agencies, both of which have a statutory basis: the state security service (the « *Surêté de l'État* » or « Staats Veiligheid »)(the "SE"); and a military and general intelligence and security service (« *Service Général du Renseignement et de la Sécurité des Forces armées* » or « Algemene Dienst Inlichtingen en Veiligheid »)(the "SGR").[151]

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[147] See press release of the Chancellerie du Premier Ministre – Conseil des Ministres, dated March 30,2004: http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=contentPage&docId=33881.

[148] See press release of the Chancellerie du Premier Ministre – Conseil des Ministres, dated March 30,2004: http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=contentPage&docId=33881.

[149] See press release of the Chancellerie du Premier Ministre – Conseil des Ministres, dated March 30,2004: http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=contentPage&docId=33881.

[150] See text of speech by Prime Minister Guy Verhofstadt, Committee meeting 18 March 2004, debate on terrorism: http://www.dekamer.be/doc/CCRI/pdf/51/ic202.pdf , p. 6. See also http://www.belgium.be/eportal/application?languageParameter=fr&pageid=contentPage&docId=7849.

[151] See the *Loi organique des services de renseignement et de sécurité*, dated 30 November 1998, file no. 1998-11-30/32, located at http://just.fgov.be/index_fr.htm. See also http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=contentPage&docId=7849.

Both agencies are charged by their governing legislation to ensure respect for and to contribute to the protection of individual rights and freedoms, as well as the democratic development of Belgian society.[152]

The SE is responsible for intelligence collection and analysis of any activity which threatens or could threaten internal domestic security and democratic and constitutional order, external security and international relations, economic and scientific capacity, and any other fundamental national interest as defined by ministerial committee.[153] These threats are further defined in the iegislation, and include terrorism and extremism.[154]

The SGR is responsible for intelligence collection and analysis of any activity which threatens or could threaten territorial integrity, military defence planning and missions, the security of Belgians abroad, and any other fundamental national interest as defined by ministerial committee.[155] It must also ensure the security of ministry of defence personnel, military installations, equipment and systems; and protect military secrecy.[156]

The legislation governing the SE and the SGR also creates an obligation in public servants and agencies, as well as judicial authorities, to disclose information to these agencies in certain circumstances.[157]

c. Review, Oversight and Accountability

Law enforcement

Belgium's police forces – both local and federal – are provided for by statute.[158] They are under the direction of the ministers of justice and the interior, who coordinate

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[152] *Loi organique des services de renseignement et de sécurité*, art. 2.
[153] *Loi organique des services de renseignement et de sécurité*, art. 7. The ministerial committee is discussed in more detail below, under "Review, Oversight and Accountability".
[154] *Loi organique des services de renseignement et de sécurité*, art. 8.
[155] *Loi organique des services de renseignement et de sécurité*, art 11. The ministerial committee is discussed in more detail below, under "Review, Oversight and Accountability".
[156] *Loi organique des services de renseignement et de sécurité*, art. 11, paras. 2 and 3.
[157] *Loi organique des services de renseignement et de sécurité*, art. 14.
[158] *Loi organisant un service de police integré, structure à deux niveaux*, dated 7 December 1998, file no. 1998-12-07/31.

policing policy and police management. They must ensure the efficient operation of the police, and must also file an annual national security plan with the parliament.[159]

A federal police council (« *Conseil fédéral de police* ») advises the ministers of justice and the interior on the overall functioning and organization of the police forces. The council provides its advice largely on the basis of annual reports which are prepared following general inspections (« *inspections générales* »). It also advises on the national security plan, and regularly evaluates its execution by the police. The *Conseil* is made up of representatives of the two ministries, as well as prosecutor representatives, a judge, a police chief, and other local representatives. Its advice on the national security plan must be filed with the parliament.[160]

There is also a council of local representatives (« *Conseil consultatif des bourgmestres* »), which has the right to review and provide an opinion on any draft regulations affecting local police forces. The statute requires the executive branch to ensure that the council membership is "representative", given the "types of police zones" it represents.[161] Police zones are in turn administered by various levels of local authorities.[162]

Committee P

Review of Belgium's police forces, including any agency or individual acting in the capacity of police officer(s), is carried out by a body called the permanent committee for the review of police forces (« *Comité permanent de contrôle des services de police* ») ("Committee P").[163] Committee P's general mandate is to review police forces' respect for individual rights, as well as police forces' coordination and effectiveness.[164] It has jurisdiction over all of Belgium's police forces, local or federal, as well as any public authority whose members are acting in the capacity of a police officer.[165] It conducts

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[159] *Loi organisant un service de police integré structuré à deux niveaux*, art. 4.
[160] *Loi organisant un service de police integré structuré à deux niveaux*, arts. 6-7.
[161] *Loi organisant un service de police integré structuré à deux niveaux*, art. 8.
[162] *Loi organisant un service de police integré structuré à deux niveaux*, arts. 9ff.
[163] *Loi organique du contrôle des services de police et de renseignements*, dated 18 July 1991, file no. 1991-07-18/53.
[164] *Loi organique du contrôle des services de police et de renseignements*, art. 1.
[165] *Loi organique du contrôle des services de police et de renseignements*, arts. 3. 9.

reviews of police activities, methods, internal regulations, directives, and any documents regulating members' conduct.[166] Since 1999, it has also been mandated to conduct reviews of the activities and methods applied by the general inspection service for the police (« *Inspection générale*»)[167], which monitors the overall functioning of the police for the federal police council discussed above.

Committee P commences its reviews either on its own initiative; on the initiative of its investigation branch (« Service d'enquêtes »)[168]; upon receipt of a complaint; or by request, either from one of the houses of parliament, from a minister (who is given such authority under the statute), or from certain other authorities, such as prosecutors and local police authorities.[169] Committee P prepares reports of its investigations, including conclusions and recommendations, which are generally filed with the parliament.[170]

Committee P's annual report for 2003 reported on investigations addressing matters as diverse as allegations of theft of personal items by police officers, the quality of holding cells and food provided by the police to detainees, allegations of racism and discrimination, the adequacy of warrants, the efficiency of the federal police force's approach to terrorism, the propriety and efficiency of police integration with other domestic and international agencies, and the efficiency of police information-sharing systems.[171]

Committee P is made up of five individuals appointed by the *Chambre des représentants* for a term of five years. Individuals are only eligible for appointment if they have had at

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[166] *Loi organique du contrôle des services de police et de renseignements*, art. 9.
[167] *Loi organique du contrôle des services de police et de renseignements*, art. 14bis.
[168] The governing statute expressly provides for the establishment of an investigations branch within Committee P, and with the authority to conduct investigations either on its own initiative or at the request of Committee P. See the *Loi organique du contrôle des services de police et de renseignements*, arts. 1, 15-16.
[169] *Loi organique du contrôle des services de police et de renseignements*, art. 8.
[170] There are variations on this reporting structure, in particular when the investigation is conducted at the request of a minister. See arts. 9ff. See also Committee P's 2003 annual report, p. 8: Comité P, Rapport annuel 2003, http://www.comitep.be/2003/Fr/RA_2003.pdf. There are also numerous possibilities for Committee P's treatment of complaints, including dismissal, investigation, and transfer to relevant police authorities or the « *inspection générale* » discussed above. See arts. 10ff.
[171] Committee P's 2003 annual report: Comité P, Rapport annuel 2003, http://www.comitep.be/2003/Fr/RA_2003.pdf.

least 7 years of high-level experience in the area of criminal law, criminology, public law or management, acquired in a setting similar to policing or intelligence. The chair of the Committee must be a judge. All members must have "top secret" clearance.[172]

Committee P is required by statute to exchange information with, and to meet regularly with Committee I, the review body for Belgium's intelligence agencies.[173] It must also "consult" with the *Inspection générale* "with a view to" fulfilling its mandate.[174]

Belgium's police forces are also subject to judicial scrutiny, insomuch as their investigative activities are reviewed by the courts in the context of warrant authorizations, prosecutions etc.

Intelligence agencies

Both of Belgium's intelligence agencies are provided for by statute.[175] The legislation sets out their responsibilities, as well as certain rules for their activities, including information collection, retention and sharing.[176]

The SE is under the authority of the minister of justice. The minister of the interior, however, has some authority to request the services of the agency and to approve regulations governing the agency.[177] The GISS is under the authority of the minister of national defence.[178] Intelligence policy and operational priorities for both agencies are formulated by a ministerial committee (« *Le Comité ministériel* »), which is chaired by the Prime Minister.[179] This Committee also issues directives to the intelligence agencies, with which the latter are obligated to comply.[180]

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[172] *Loi organique du contrôle des services de police et de renseignements*, art. 4.
[173] *Loi organique du contrôle des services de police et de renseignements*, arts. 52ff.
[174] *Loi organique du contrôle des services de police et de renseignements*, art. 14bis.
[175] *Loi organique des services de renseignement et de sécurité*, dated 30 November 1998, file no. 1998-11-30/32.
[176] *Loi organique des services de renseignement et de sécurité*, arts. 12-43.
[177] *Loi organique des services de renseignement et de sécurité*, arts. 5-6.
[178] *Loi organique des services de renseignement et de sécurité*, art. 10.
[179] See http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=contentPage&docId=7849. See also the *Arrêté royal portant creation d'un Comité*

A second committee plays the role of "intermediary" between *Le Comité ministériel* and the actual security agencies, as well as the police forces: a collegium on intelligence and security (« *Le Collège du Renseignement et de la Sécurité* »). This body includes the heads of the intelligence agencies and the police and representatives of the Prime Minister. It oversees the execution by the agencies of the policies set by *Le Comité ministériel*, synthesizes and reports on intelligence analyses from the various agencies, and alerts *Le Comité* to possible new threats or priorities.[181]

Committee I

Review of Belgium's intelligence agencies is carried out by the permanent committee for the review of intelligence (« *Comité permanent de contrôle des services de renseignements* ») ("Committee I").[182] Committee I's general mandate is similar to that of Committee P's: to scrutinize the intelligence agencies' respect for individual rights, as well as their coordination and effectiveness.[183] It has jurisdiction not only over Belgium's two principal intelligence-collection bodies, SE and GISS, but also over any public body with a mandate to collect and analyse information in the interest of security.[184] It reviews the intelligence agencies' activities and methods, as well as their internal regulations and directives, and all documents regulating members' conduct.[185]

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ministériel du renseignment et de la sécurité, dated 21 June 1996, located at http://just.fgov.be/index_fr.htm, file no. 1996-06-21/35, which created this Committee. It is not clear from the legislation whether this Committee's intelligence-policy formulation includes intelligence-gathering activities of police forces, though the fact that the intermediary *Collège* (discussed in the next paragraph) includes representatives of the police forces suggests that the intelligence activities of police forces are at least a part of the scope of intelligence policy formulation by the Committee.

[180] See *Loi organique des services de renseignement et de sécurité*, dated 30 November 1998, arts. 4 and 10.

[181] See http://www.belgium.be/eportal/application?origin=searchResults.jsp&event=bea.portal.framework.internal.refresh&pageid=contentPage&docId=7849. See also the *Arrêté royal portant creation du Collège du renseignement et de la sécurité*, dated 21 June 1996, located at http://just.fgov.be/index_fr.htm, file no. 1996-06-21/36, which created this collegium ; as well as amendments dated December 18, 1997, file no. 1997-12-18/45 and 13 June 2001, file no. 2001-06-13/30.

[182] *Loi organique du contrôle des services de police et de renseignements*, dated 18 July 1991, file no. 1991-07-18/53. See also http://www.comiteri.be.

[183] *Loi organique du contrôle des services de police et de renseignements*, art. 1.

[184] *Loi organique du contrôle des services de police et de renseignements*, arts. 3, 33.

[185] *Loi organique du contrôle des services de police et de renseignements*, art. 32.

The Committee can conduct reviews on its own initiative; on the initiative of its investigation service (« *Service d'enquêtes* »)[186]; upon receipt of a complaint, or upon request by one of the houses of parliament or by one of the ministers identified in the statute.[187] Committee I prepares reports of its investigations, including conclusions and recommendations, which are generally filed with the parliament.[188]

Committee I's annual report for 2003 includes its conclusions and recommendations on a wide range of topics, such as the role of intelligence services in the protection of national scientific and economic capacity, the conduct of the SE and the GISS in certain investigations, complaints received from members of the public, the efficiency of the "protected persons" unit of the SE, and the information-sharing practices of the SE and the GISS.[189]

Committee I is made up of three individuals appointed by the senate for a term of five years. Individuals are only eligible for appointment if they have a law degree, and if they have had at least 7 years of high-level experience in the area of criminal law, criminology, public law or management, acquired in a setting similar to policing or intelligence. The chair of the Committee must be a judge. All members must have "top secret" clearance.[190]

As noted above, Committee I is required by statute to exchange information and meet regularly with Committee P.[191]

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[186] As with Committee P, the statute expressly provides for the establishment of an investigation branch within Committee I, and provides it with the authority to commence investigations on its own initiative or at the request of the Committee. See the *Loi organique du contrôle des services de police et de renseignements*, arts. 1, 39-40.
[187] *Loi organique du contrôle des services de police et de renseignements*, arts. 33ff.
[188] There are variations on this reporting structure, in particular when the investigation is conducted at the request of a minister. See arts. 33ff.
[189] *Comité R, Rapport d'activités 2003*, http://www.comiteri.be/index_fr.html.
[190] *Loi organique du contrôle des services de police et de renseignements*, arts. 28ff.
[191] *Loi organique du contrôle des services de police et de renseignements*, arts. 52ff.

III. GERMANY

a. Introduction

Germany is a federal republic, in which the division of powers between the federal government (« *Bund* ») and the States (the sixteen « *Länder* ») has helped to shape the institutional framework of policing and security intelligence. That framework has traditionally distinguished between police activity and intelligence activity, and assigned the bulk of responsibility for policing to the States. Interesting features of the German framework appear to include the involvement of the public prosecution office in directing police investigations, the States' involvement in intelligence collection, and the absence of an independent body to deal with complaints regarding the police.

Legislative changes since September 2001, termed the "first security package" and "second security package," altered aspects of both policing and intelligence.[192] The first security package amended substantive laws to target extremist and terrorist organizations. The second security package amended regulations to seventeen statutes and five statutory orders, and altered the boundaries within which both police and intelligence bodies operate.[193] It broadened the scope of permissible actions for federal security and law enforcement authorities,[194] and increased information sharing between agencies. Funding for national security and counter-terrorism has also increased.[195]

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[192] See: Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422, at 435; Erik van de Linde, Kevin O'Brien, Gustav Lindstrom et al, "Quick Scan of Post 9/11 National Counter-Terrorism Policymaking and Implementation in Selected European Countries," Research Project for the Netherlands Ministry of Justice (Leiden: Rand Europe, May 2002), Rand Europe: http://www.rand.org/randeurope/review/1.4-obrien.html, at 61-75; German Foreign Office, Report to the Security Council Committee established pursuant to Resolution 1373 (2001) concerning Counter-Terrorism, http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/vn/ctc_bericht.pdf; Markus Rau, "Country Report Germany", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm.

[193] Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422, at 441. The second security package came into force January 1, 2002.

[194] See for example *Terrorismusbekämpfungsgesetz* (*Counter-terrorism law*), Art. 1, Art. 6.

[195] Erik van de Linde, Kevin O'Brien, Gustav Lindstrom et al, "Quick Scan of Post 9/11 National Counter-Terrorism Policymaking and Implementation in Selected European Countries," Research Project for the

This section of the paper provides a preliminary outline of the institutional framework for Germany's law enforcement and intelligence services, including control and review mechanisms.[196]

b. Law Enforcement and Intelligence

Constitutional framework for law enforcement

The German constitution, the Basic Law (« *Grundgesetz* »), divides legislative jurisdiction between the federal government and the States.[197] The States have the authority to legislate regarding criminal law and policing generally.[198] However, the federal government has the exclusive authority to legislate in certain areas significant to national security activities. These include: Federation-State cooperation regarding criminal police; Federation-State cooperation regarding protection of the constitution; Federation-State cooperation regarding protection against activities in Germany which endanger Germany's foreign interests through the use of force or actions in preparation for the use of force; the establishment of a Federal Criminal Police Office; and the international control of crime.[199] There are also provisions for "direct federal administration" of Federal Border Guard authorities and "central offices for police information and communications for the criminal police…."[200]

State Police Forces

Internal organization of the police varies by State, but it appears that all State police are divided into a uniformed service called the Protective Police (« *Schutzpolizei* »), and Criminal Police (« *Kriminalpolizei* »), who undertake criminal investigations.[201]

Netherlands Ministry of Justice (Leiden: Rand Europe, May 2002), Rand Europe: http://www.rand.org/randeurope/review/1.4-obrien.html at 64-65.

[196] Research was conducted using sources in translation only.

[197] See *Grundgesetz* (The Basic Law), The Constitution of the Federal Republic of Germany (May 23, 1949), ed. Axel Tschentscher (Wuerzburg: Jurisprudentia Verlag Wuerzburg, 2002) http://jurisprudentia.de/jurisprudentia.html [Last updated 18 July 2003].

[198] Basic Law, Art. 74, Art. 72(1)-(2).

[199] Basic Law, Art. 73(10).

[200] Basic Law, Art. 87(1).

[201] Piotr Bysina, Organization for Security and Co-operation in Europe, Legislation Online, "Police: Germany," http://www.legislationonline.org/index.php?topic=11&PHPSESSID=95ae8830ff1bcb7a5ff0.

Police powers at both the federal and State levels are governed by the federal *Code of Criminal Procedure* (CCP).[202] While Police have a duty to take initial action as soon as they receive information about a potentially criminal offence, the public prosecution office is also obligated to investigate the facts as soon as it obtains knowledge of a suspected criminal offence, in order to decide if charges should be laid.[203] It is authorized to investigate on its own or through police authorities.[204] Police officials must comply with a request for investigation on the part of the public prosecution office.[205] They are also required to transmit the records of their investigations to the public prosecution office without delay.[206] The Federal Administrative Court has summarized the public prosecution office's ultimate responsibility for the direction of police investigations, stating that "investigations to prosecute criminal acts form an integrated whole; the investigation proceeding is not split into a police proceeding and a public prosecution office proceeding."[207]

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[202] *Strafprozessordnung* (*Code of Criminal Procedure*) (CCP).

[203] CCP, s. 160(1), cited in Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf at 35.

[204] CCP, s. 161(1), cited in Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf at 35.

[205] CCP, s. 161(1), cited in Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf at 35.

[206] CCP, s.163d(2), cited in Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf at 36.

[207] Federal Administrative Court Decisions Vol. 47, 255-262, cited in Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf, at 37.

Federal Criminal Police Office

The Federation government has exclusive power to legislate the creation of a Federal Criminal Police.[208] This agency is called the Federal Criminal Police Office («*Bundeskriminalamt* », or BKA).[209]

The BKA coordinates cooperation between the Federation and the State police. It provides training, conducts research on criminal investigation methods, collects identification material, provides forensics facilities, and compiles statistics.[210] It is the central office for police information, and collects data via an electronic information network, INPOL, that is made available to police at a federal and a state level.[211] The BKA is also the office for police cooperation on an international level, with liaison officers around the world.[212]

Apart from its role as a central agency, the BKA also has jurisdiction over investigations in some areas, including both international terrorism and, in some circumstances, domestic security. It has original jurisdiction in cases involving internationally organized trafficking in weapons, ammunition, explosives or drugs; internationally organized production or passing off of counterfeit currency; internationally organized money laundering; and international terrorism.[213] The Federal Minister of the Interior, the Federal Prosecutor General or a public prosecution office can also assign the BKA to investigate significant criminal offences against internal security.[214] Finally the BKA may enter cases when requested by State authorities, or when cases involve two or more States.

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[208] Basic Law, article 73(10).

[209] *Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes under der Laender in kriminalpolizeilichen Angelegenheiten* (*Bundeskriminalamtgesetz*) vom 7. Juli 1997, BGBl. 1997 I, 1650; cited in Bundeskriminalamt, "BKA Profile", http://www.bka.de/profil/broschueren/bka_das_profil_eng.pdf.

[210] Bundeskriminalamt, "BKA Profile", http://www.bka.de/profil/broschueren/bka_das_profil_eng.pdf .

[211] Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf at 41-42.

[212] Bundeskriminalamt, "BKA Profile", http://www.bka.de/profil/broschueren/bka_das_profil_eng.pdf.

[213] Bundeskriminalamt, "BKA Profile", http://www.bka.de/profil/broschueren/bka_das_profil_eng.pdf.

[214] Bundeskriminalamt, "BKA Profile", http://www.bka.de/profil/broschueren/bka_das_profil_eng.pdf.

The BKA's State Security Division investigates almost all serious offences in Germany that involve politically motivated crimes.[215] It conducts investigations in cases involving politically motivated offences directed at the life, limb, or liberty of members of the federal constitutional organs or their guests.[216] It also investigates other politically motivated offences when asked to do so by State authorities or directed to do so by the Federal Minister of the Interior or the Federal Prosecutor General.[217] The Organized and General Crime (OA) Division may also become involved in national security investigation.[218]

Federal Border Guard

The Federal Border Guard (« *Bundesgrenzschutz* », or BGS) operates under the Federal Ministry of the Interior to provide security at borders, transportation sites, and other federal areas. It also acts as a reserve force to police major disturbances and emergencies beyond the scope of State police.[219]

The second security package extended the BGS' area of operation to fifty kilometres inland from coastal areas, and provided other enhancements to their powers.[220] If necessary for more effective control, the Federal Minister of the Interior is authorized to further expand their zone of operation.[221]

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[215] Bundeskriminalamt, "The Bundeskriminalamt: Its Mandate," http://www.bka.de/profil/broschueren/bka_der_gesetzliche_auftraf_engl.pdf at 5.
[216] Bundeskriminalamt, "The Bundeskriminalamt: Its Mandate," http://www.bka.de/profil/broschueren/bka_der_gesetzliche_auftraf_engl.pdf at 5.
[217] Bundeskriminalamt, "The Bundeskriminalamt: Its Mandate," http://www.bka.de/profil/broschueren/bka_der_gesetzliche_auftraf_engl.pdf at 5.
[218] Bundeskriminalamt, "The Bundeskriminalamt: Its Mandate," http://www.bka.de/profil/broschueren/bka_der_gesetzliche_auftraf_engl.pdf at 6.
[219] Basic Law, Art. 91.
[220] *Counter-terrorism law*, Art. 6 cited in Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422 at 452. Now the new s. 2, para. 2(3) of *Gesetz ueber den Bundesgrenzschutz*, 19 October 1994, BGBl. 1994 I, 2978 (*Federal Border Guard Act*).
[221] Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm., at 25.

Federal Office for the Protection of the Constitution

The Federal Office for the Protection of the Constitution (« *Bundesverfassungsschutz* »), or BfV) is Germany's federal domestic intelligence agency. The Basic Law defines "protection of the constitution" as protection of the free democratic order, of the existence and the security of the Federation, or of a State.[222]

The BfV's governing statute sets out the BfV's main task as gathering and analysing information on activities that are directed against the "free and democratic order" or state security, activities carried out by a foreign power in Germany, and activities in Germany that threaten German foreign interests through force or preparations for the use of force.[223] In addition, since 2002 the BfV's mandate now also includes gathering and analysing information on activities "directed against the idea of international understanding" (Basic Law, art. 9(2)), especially against "the peaceful coexistence of peoples" (Basic Law, art. 26(1)).[224] The BfV also assists with security clearance checks of personnel for security-sensitive civilian or military positions.[225]

The BfV describes itself as working "closely…with other security authorities, in particular the other federal intelligence services (MAD and the BND – see below), responsible for foreign intelligence – and with police and criminal prosecution authorities."[226]

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[222] Basic Law, Art. 73(10)(b).

[223] Bundesverfassungsgesetz (Federal Constitution Protection Act), section 3 para. 1(1)-(3). Cited in Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 13.

[224] *Federal Constitution Protection Act*, s.3, para. 1(4); Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 13.

[225] The BfV's powers in this regard are detailed in the *Sicherheitsüberprüfungsgesetz* (*Security Clearance Act*). See Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 14. See also Markus Rau, "Country Report Germany", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 28: the definition of "security sensitive areas" was expanded by the second security package.

[226] Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*,

The BfV uses both public information and covert intelligence methods.[227] The second security package broadened the BfV's powers to permit it, subject to certain conditions, to demand information from financial institutions, airlines, postal service providers and telecommunications companies, without disclosure to targeted customers.[228] The BfV does not have the powers to arrest, to search, to interrogate, or to seize property.[229] The BfV may hand over a matter to the courts, public prosecution office, or police to "decide independently" what action is required.[230]

Every State has its own Office for the Protection of the Constitution, with a structure comparable to that of the BfV. Each one has regional competence and is subject to State regulations. Intelligence gathered by the States is stored centrally by the BfV, which does not have direct control over the activities of the States, but which is obligated to cooperate with them.[231] The Federal Minister of the Interior has raised the question of whether the BfV might in future be given the right to issue directives to the equivalent State-level authorities.[232]

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http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 14.

[227] Office for the Protection of the Constitution, "Tasks, Organization and Working Methods," http://www.verfassungsschutz.de/en/about_us.html/bfv_engl.html.; Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 13.

[228] *Federal Constitution Protection Act*, s. 8, para. 5-8; *Counter-terrorism law*, Art. 1; see Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 21.

[229] Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422at 14.

[230] Office for the Protection of the Constitution, "Tasks, Organization and Working Methods," http://www.verfassungsschutz.de/en/about_us.html/bfv_engl.html.

[231] Office for the Protection of the Constitution, "Tasks, Organization and Working Methods," http://www.verfassungsschutz.de/en/about_us.html/bfv_engl.html. See also The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation- Germany," http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html.

[232] See for example "Internal Affairs Ministers discuss security structures," July 7, 2004, German News – English Edition, http://www.germnews.de/cgi-bin/show/dn/2004/07/07.html/4.

Military Counterintelligence Service

The responsibilities of the Military Counterintelligence Service (« *Militärische Abschirmdienst* », or MAD) include gathering and evaluating information on anti-constitutional activities within the German armed forces, and on activities directed against the German armed forces from the outside, such as espionage.[233] Like the Office for the Protection of the Constitution, MAD's mandate, in its case in respect of Ministry of Defence workers, has been enlarged to encompass gathering and analysing information on activities directed against the idea of international understanding, especially against the peaceful co-existence of peoples.[234] It may also now request telecommunications and teleservice companies to pass on data regarding use of their services.[235] Another amendment now permits MAD to transmit personal data to other agencies or institutions.[236]

Federal Intelligence Service

The Federal Intelligence Service (« *Bundesnachrichtendienst* », or BND) is Germany's foreign intelligence service. It targets spies and enemy agents; however, it may also monitor mail and telecommunications.[237]

Since 1994, the BND has been authorised to monitor international telecommunications without prior concrete suspicion in order to prevent certain offences.[238] It may now

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[233] Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 23, fn 99. MAD's governing statute is the *Gesetz über den Militärischen Abschirmdienst* (*Military Counterintelligence Service Act*).

[234] Section 1, para. 1(2), *Military Counterintelligence Service Act*. Cited in Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 23.

[235] Section 10, para. 3, *Military Counterintelligence Service Act*. Cited in Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 23.

[236] Section 11, para. 1, *Military Counterintelligence Service Act*. Cited in Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 23.

[237] See Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 24 and fn 105. The BND's governing statute is the *Bundesnachrichtendienstgesetz*, *Gesetz über den Bundesnachrichtendienst* vom 20. Dezember 1990, BGBl. 1990 I, 2979 (*Federal Intelligence Service Act*).

request information from financial service institutions, postal service providers, telecommunications services, and airlines.[239] Amendments also now authorize the BND to transmit personal data to the Federal and State Offices for the Protection of the Constitution and to MAD where necessary to those organizations' activities regarding the use of force or preparations for the use of force within Germany, directed against the idea of international understanding, particularly against the co-existence of peoples.[240]

c. Review, Oversight and Accountability

Police

The Federal Criminal Police are the responsibility of the Federal Ministry of the Interior, while the State Police Forces fall under their respective State Ministries of the Interior. Each State Ministry of the Interior is represented in a Council of Interior Ministers that addresses a variety of intelligence, law enforcement, and emergency preparedness issues.[241] The State and Federal Ministries of Justice are responsible for their respective public prosecution offices. Guidelines issued by those ministries for the conduct of the public prosecution office may affect their interaction with the police force.[242]

There is little readily available information on control mechanisms and accountability structures within the Federal Criminal Police or the equivalent State agencies. Internal police disciplinary procedures vary by State. Germany does not have an independent authority responsible for complaints of misconduct against the police.[243]

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[238] See Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422 at 451.

[239] *Counter-terrorism Act*, Art. 1(3) and 3. *Federal Intelligence Service Act*, Art. 3.

[240] *Gesetz zur Beschränkung des Brief-, Post-, und Fernmeldegeheimnisses (G-10)* 26. June 2001, BGBl. 2001 I, 1254, 2298 (*the Act on Article 10 of the Basic Law*), s. 7 para. 2(1). See Markus Rau, "Country Report Germany,", Max Planck Institute for Comparative Public Law and International Law, Conference on Terrorism, held 24-25 January 2003 http://edoc.mpil.de/conference-on-terrorism/country.cfm at 24.

[241] United States General Accounting Office, "Combating Terrorism: How Five Foreign Countries are Organized to Combat Terrorism," Report to Congressional Requesters, GAO/NSIAD-00-85, (Washington: United States General Accounting Office, 2000) http://www.gao.gov/archive/2000/ns00085.pdf at 16.

[242] See Eberhard Siegismund, "The Competence of the Police in Investigation Proceedings," Visiting Experts' Papers, 120th International Senior Seminar, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders http://unafei.or.jp/pdf/no60/ch02.pdf at 37.

[243] For comments, see for example Amnesty International, "Back in the Spotlight: Allegations of Police Ill-Treatment and Excessive Use of Force in Germany," EUR 23/001/2004 (January 14, 2004), http://web/amnesty.org/library/Index/ENGEUR230012004?open&of=ENG-DEU; United Nations

Special investigation measures by law enforcement agencies are subject to judicial controls. The *Code of Criminal Procedure* provides for special investigation measures, such as interception of communications and undercover investigations. Police interception and recording of telecommunications may be ordered by a judge or, in exigent circumstances, by the public prosecution office, in which case a judge must confirm the order.[244] The test requires suspicion of criminal involvement in certain serious crimes, and that other means of establishing facts be much more difficult. The order is time-limited. A similar test applies to other surreptitious investigatory measures that may also be ordered by a judge or the public prosecution office, including surveillance using technical means, or recording of private speech.[245]

The example of "data screening" illustrates how the varying control schemes in the States may affect the results of review. "Data screening" activities involve aligning sets of information in order to ascertain or disprove information in the course of investigation.[246] Aspects of data screening are regulated by the *Code of Criminal Procedure*. However, authorization to engage in data screening varies by State. In some States, it is dependent upon authorization by a district court judge, while in other States, authorization from the head of the State Criminal Police is required, or the agreement of the Secretary of the Interior. The legal test to be met also varies, for example in the degree of danger and the object of the danger that must be at stake. [247] It appears, therefore, that mechanisms of control and authority over police activity vary considerably by State.

Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Germany (Concluding Observations/Comments), (11/06/2004), CAT/C/CR/32/7 http://www.unhchr.ch/tbs/doc.nsf/0/5d9c452885c30123c1256ebd00506b57?Opendocument .

[244] For this paragraph, see CCP s. 100a, cited in Piotr Bysina, Organization for Security and Cooperation in Europe, "Police Powers of Investigation: Germany," Legislation Online, http://www.legislationonline.org/index.php?topic+142&PHPSESSID=945ae8830ff1bcb7a5ff.

[245] See CCP, s. 100c, cited in Piotr Bysina, Organization for Security and Cooperation in Europe, "Police Powers of Investigation: Germany," Legislation Online, http://www.legislationonline.org/index.php?topic+142&PHPSESSID=945ae8830ff1bcb7a5ff.

[246] Wilhelm Achepoehler and Dr. Holger Niehaus, "Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany," 5 German L. J. 495 at 495.

[247] For this paragraph, see Wilhelm Achepoehler and Dr. Holger Niehaus, "Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany," 5 German L. J. 495 at 499.

Access to judicial remedies also varies depending on which authority ordered data screening. If a district judge makes the initial order, appeals to the district court and then to the appellate court may follow, while if the head of the State Police or the Secretary of the Interior made the order, the administrative courts retain jurisdiction.[248] This affects the potential remedy. If the district judge's decision permitting screening is reversed, the entire police application for data screening is reversed and the process must halt. In administrative court, however, a ruling in favour of a person who challenges being the subject of data screening is effective only between the parties, and the process would continue for others affected by the data screening order.[249]

Intelligence services and law enforcement agencies are both subject to review by data protection authorities and the Auditor General. The electronic databases maintained by federal agencies, including the intelligence services and the Federal Criminal Police, are monitored by the Federal Commissioner for Data Protection (« *Bundesbeauftragte für den Datenschutz* »).[250] The Commissioner conducts audits, rather than only responding to complaints.[251] The Commissioner submits a "detailed" report to the Federal Parliament every two years on its activities.[252] Member States also have State data protection offices, which monitor activities by State agencies, such as the criminal police and the office for constitutional protection.

The Federal Auditor General (« *Bundesrechnungshof* ») is an independent office that conducts sample fiscal audits of federal departments, including law enforcement and

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[248] Wilhelm Achepoehler and Dr. Holger Niehaus, "Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany," 5 German L. J. 495 at 500.

[249] Wilhelm Achepoehler and Dr. Holger Niehaus, "Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany," 5 German L. J. 495 at 500

[250] See for example, Bundeskriminalamt, "BKA Profile", http://www.bka.de/profil/broschueren/bka_das_profil_eng.pdf; The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html.

[251] See comments in Colin J. Bennett, "The Data Protection Authority: Regulator, Ombudsman, Educator or Campaigner?," Paper presented to the International Conference of Data Protection Commissioners, Cardiff, Wales, September 9-11, 2002, http://web.uvic.ca/polisci/bennett/pdf/cardiff.pdf at 2.

[252] The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html.

intelligence services.[253] The German constitution mandates the creation of the Federal Auditor General's office:

> The Federal Audit Office, the members of which enjoy judicial independence, audits the account and examines the management of the budget and the conduct of business as to economy and correctness. The Federal Audit Office submits an annual report directly to the Government as well as to the Parliament and to the Senate. In all other respects the powers of the Federal Audit Office are regulated by federal legislation.[254]

It is not clear whether the Auditor General's access to information is restricted by secrecy requirements in the case of the intelligence services. It reports to audited bodies by way of "management letters."[255] In addition to its annual report, it may also submit special reports on significant issues at any time.[256] Each government department's internal inspectors monitor compliance with internal regulations.[257] Regional offices are subordinate to the Federal Auditor General's office.[258]

Intelligence agencies

The Federal Office for the Protection of the Constitution and the Federal Intelligence Service are under the authority of the Federal Minister of the Interior, while the State offices for the Protection of the Constitution fall under the authority of their respective Ministers of the Interior as well. The Federal Office for Information Security is under the responsibility of the Minister of the Interior. The Military Counterintelligence Service is organised under the Ministry of Defence.

As noted above, the intelligence agencies are subject to monitoring by the Federal Data Protection Office (except State agencies, which are subject to their respective State offices) and the Auditor General.

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[253] Bundesrechnungshof, "Functions," http://bundesrechnungshof.de/en/frame1/1024.html.
[254] Basic Law, Art. 114(2).
[255] Bundesrechnungshof, "Functions," http://bundesrechnungshof.de/en/frame1/1024.html.
[256] Bundesrechnungshof, "Functions," http://bundesrechnungshof.de/en/frame1/1024.html.
[257] United States General Accounting Office, "Combating Terrorism: How Five Foreign Countries are Organized to Combat Terrorism," Report to Congressional Requesters, GAO/NSIAD-00-85, (Washington: United States General Accounting Office, 2000) http://www.gao.gov/archive/2000/ns00085.pdf at 23.
[258] Bundesrechnungshof, "Functions," http://bundesrechnungshof.de/en/frames1/1024.html.

The Coordinator for Intelligence (« *Koordinierung der Nachrichtendienste des Bundes* ») is a direct advisor to the Chancellor, responsible for developing a general policy framework and coordinating State issues.[259] This office provides "executive oversight for national issues" in intelligence.[260] After September 11, 2001, the Chancellor created a security commission (« *Sicherheitslage* ») comprising representatives of the Foreign Office, Federal Ministry of Defence, Federal Ministry of the Interior, Federal Ministry of Justice, the Federal Chancellery and intelligence services. It meets frequently to assess dangers to the Federal Republic and coordinate activities between the authorities.[261]

Parliamentary scrutiny of the federal intelligence services is provided by the Parliamentary Control Commission (« *Parlamentarisches Kontrollgremium* », or PKGr).[262] It is composed of nine members elected by the Bundestag, reflecting the political composition in the Bundestag.[263] It meets at least once per quarter and is bound by secrecy.[264] The PKGr is to be regularly provided with "comprehensive information" on the general activities of the BfV, MAD, and BND, and on incidents of special significance.[265] Upon request, the federal government must permit the PKGr to inspect

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[259] United States General Accounting Office, "Combating Terrorism: How Five Foreign Countries are Organized to Combat Terrorism," Report to Congressional Requesters, GAO/NSIAD-00-85, (Washington: United States General Accounting Office, 2000) http://www.gao.gov/archive/2000/ns00085.pdf at 16.

[260] United States General Accounting Office, "Combating Terrorism: How Five Foreign Countries are Organized to Combat Terrorism," Report to Congressional Requesters, GAO/NSIAD-00-85, (Washington: United States General Accounting Office, 2000) http://www.gao.gov/archive/2000/ns00085.pdf at 22.

[261] Erik van de Linde, Kevin O'Brien, Gustav Lindstrom et al, "Quick Scan of Post 9/11 National Counter-Terrorism Policymaking and Implementation in Selected European Countries," Research Project for the Netherlands Ministry of Justice (Leiden: Rand Europe, May 2002), Rand Europe: http://www.rand.org/randeurope/review/1.4-obrien.html at 61-62.

[262] *Parliemtentarisches Kontrollgremiumgesetz*, (*Parliamentary Control Commission Act*).

[263] The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html .

[264] The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html.

[265] *Parliamentary Control Commission Act*, section 2. See Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 15.

records and files, and to interview intelligence service staff.[266] It will be informed about measures intruding on mail and telephone communications and must report annually to Parliament about the scope and method of these measures.[267] Interception of international communications, for example automatic telephone surveillance based on certain search terms, requires the permission of the PKGr.[268]

The G-10 Commission deals specifically with limitations on rights under Article 10 of the Basic Law. Article 10 generally entrenches the privacy of letters, post, and telecommunication as "inviolable."[269] However, Article 10 also includes limitations:

> Restrictions may only be ordered pursuant to a statute. Where a restriction serves the protection of the free democratic basic order or the existence or security of the Federation or a State, the statute may stipulate that the person affected shall not be informed and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.[270]

The PKGr appoints four of its members to the G-10 Commission, whose job it is to supervise the limitations placed on Article 10, in place of judicial review.[271] It receives a monthly report from the Interior Ministry with which to determine whether the measures

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[266] The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html; Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 15.

[267] Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422 at 448.

[268] Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422 at 448.

[269] Basic Law, art. 10(1)

[270] Basic Law, art. 10(2).

[271] The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html. *Article 10 Law*, paras. 14-15, cited in Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422, at 448.

have been "justified and proportional."[272] The G-10 Commission also considers the legitimacy and necessity of measures restricting Article 10 rights in advance of their implementation. This appears to consist of an "approval procedure" that requires that the Commission be satisfied that the case is one of suspected treason or membership in a terrorist organization, and that "stringent conditions" have been met.[273] It now also considers the new information-gathering powers provided to the intelligence services by the second security package.[274] The G-10 Commission may consider individual complaints as well.[275] The G-10 Commission is required to submit an annual report to Parliament, that provides a non-case-specific discussion of its activities.

The BfV releases a public annual report, based on its intelligence collection activities and those of the States. The report details the service's essential findings and analyses "significant developments and correlations."[276] For example, it identifies and describes groups that it has monitored as "extremist," and sets out information about the organization and membership numbers of these groups, as well as their areas of activity, means of communication, and goals. It also describes the activities of other named countries' intelligence services in the Federal Republic.[277]

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[272] The Interparliamentary European Security and Defence Assembly, "Parliamentary Oversight of the Intelligence Services in the WEU Countries – Current Situation and Prospects for Reform," Document A/1801 (December 2002) http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2002/1801.html.

[273] Office for the Protection of the Constitution, "Tasks, Organization and Working Methods" http://www.verfassungschutz.de/en/about_us.html/bfv_engl.html.

[274] Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 15.

[275] Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany" (May 2004) 5 German L.J. 435, German Law Journal: http://www.germanlawjournal.com/article.php?id=423 and http://www.germanlawjournal.com/article.php?id=422, at 448.

[276] Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf at 16.

[277] Office for the Protection of the Constitution, *2003 Report of the Office for the Protection of the Constitution*, http://www.verfassungsschutz.de/en/publications/annual_reports/vsbericht2003.engl.html/vsbericht_2003_engl.pdf.

IV. NEW ZEALAND

a. Introduction

The New Zealand law enforcement and intelligence framework presents a number of interesting features. Through the Officials Committee for Domestic and External Security Coordination (ODESC) and its related entities, New Zealand seeks to coordinate intelligence gathering and assessment as it relates to national security. New Zealand's national police force is involved in national security and intelligence activities, and its activities in this regard have been reorganized in the wake of September 11. Its Police Complaints Authority has been the subject of recent scrutiny and proposals for reorganization. The Inspector-General of Intelligence and Security has jurisdiction over both the New Zealand Security and Intelligence Service and the Government Communications Security Bureau. The purpose of this section is to provide an overview of these and other features of New Zealand's law enforcement and intelligence framework, including their oversight mechanisms.

b. Law Enforcement and Intelligence

Police

The New Zealand Police is a national police force, organized into twelve districts which are administered from the Office of the Police Commissioner in Wellington.[278]

Post 9/11 developments have targeted terrorist activities through changes in the New Zealand Police's organizational structure.[279] A new Assistant Commissioner for Counter-terrorism now has executive responsibility for counter-terrorism and national security matters.[280] A new Special Tactics Group has been formed to "respond operationally to terrorist emergencies."[281] New Zealand Police also maintain overseas

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[278] New Zealand Police, "About Us," New Zealand Police, http://www.police.govt.nz/about/structure.php. For an organizational chart of the New Zealand Police, see http://www.police.govt.nz/about/management-structure-2004.gif. Its enabling statute is the *Police Act 1958*. See also Ministry of Justice, *Directory of Official Information 2003-2005 Published by the Ministry of Justice Pursuant to Part III, Section 20 of the Official Information Act 1982* (Wellington: Ministry of Justice, 2003) http://www.justice.govt.nz/pubs/reports/2003/DOI-03-05/directory-03-05.pdf at 429-447.

[279] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism.

[280] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism.

[281] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism.

posts to "help identify potential terrorist risks to New Zealand" and "build relationships" with international intelligence agencies.[282]

A new Strategic Intelligence Unit (SIU) has been created within the Criminal Investigations Branch (CIB), dedicated to national security issues. Its activities include the provision of intelligence on terrorism and complex crime with national security dimensions, strategic planning to prevent terrorist use of New Zealand as a "safe haven," involvement in designation of terrorist entities (see below), and identification of risks to national security.[283] Several service units of the New Zealand Police are also involved with national security activities to varying degrees as they arise during the course of investigation: for example, the CIB also investigates terrorist financing and other terrorist offences.[284] Other units that deal with national security issues are the Diplomatic Protection Branch, the E-Crime Lab, the Financial Intelligence Unit, and the Proceeds of Crime Unit.[285]

The New Zealand Police play a role in the process by which terrorist entities are designated by the Prime Minister under the *Terrorism Suppression Act 2002*.[286] Various government agencies or officials may initiate a request that an entity be designated as terrorist, including for example the New Zealand Security and Information Service (see below) or the Ministry of Foreign Affairs and Trade. The Police are the lead agency in coordinating requests, through conducting an initial review and preparing a proposal that

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[282] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism.
[283] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism; New Zealand Response to the United Nations Security Council Counter-Terrorism Committee Questions for Response by 30 April 2004, United Nations Counter-Terrorism Committee Website, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/346/40/PDF/N0434640.pdf?OpenElement, at 1.6.
[284] New Zealand Response to the United Nations Security Council Counter-Terrorism Committee Questions for Response by 30 April 2004, United Nations Counter-Terrorism Committee Website, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/346/40/PDF/N0434640.pdf?OpenElement at 1.4. See also New Zealand Police, "Criminal Investigation Branch," http://www.police.govt.nz/service/cib; New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism.
[285] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism; New Zealand Response to the United Nations Security Council Counter-Terrorism Committee Questions for Response by 30 April 2004, United Nations Counter-Terrorism Committee Website, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/346/40/PDF/N0434640.pdf?OpenElement at 1.1, 1.4.
[286] *Terrorism Suppression Act 2002*, ss. 20-61.

states the case for designation. The Police then forward the recommendation to the Department of Prime Minister and Cabinet (DPMC).[287]

The New Zealand Police also belong to the Combined Law Agency Group (CLAG), a "joint forum" of New Zealand law enforcement agencies.[288] It is described as the "primary vehicle for sharing information and for investigative cooperation on organised crime related matters."[289]

Intelligence agencies

Apart from the activities referred to above, national security intelligence activities in New Zealand are primarily the responsibility of the New Zealand Security Intelligence Service and the Government Communications Security Bureau. Both are civilian organizations. Other organizations, particularly the Defence Directorate of Intelligence and Security and the External Assessments Bureau, also assess and analyze foreign intelligence for government use.

New Zealand Security Intelligence Service

The New Zealand Security Intelligence Service (NZSIS) is governed by the New Zealand Security Intelligence Service Act 1969. The NZSIS' role is to gather and analyse intelligence relevant to "security," advice Ministers and public authorities on security matters, conduct security clearance inquiries, and cooperate with other authorities in New Zealand and abroad.[290] The NZIS' primary activity is provision of "security intelligence

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[287] See New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism; John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 53-55.

[288] New Zealand Police, "Counter-terrorism," http://www.police.govt.nz/service/counterterrorism .

[289] House of Representatives Foreign Affairs, Defence and Trade Committee, *Report on International Treaty Examination of the United Nations Convention Against Transnational Organised Crime, the Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime* (22 February 2002) http://www.clerk.parliament.govt.nz/content/631/fdtetoctpsm.pdf at 23(c).

[290] *New Zealand Security Intelligence Service Act 1969*, s. 4(1). For the purposes of the NZSIS' activities, "security" is defined as:

advice," of which the "largest single component" relates to counter-terrorism.[291] The NZSIS' methods of collecting intelligence include covert surveillance, for example through interception of both domestic and foreign communications.

The *NZSIS Act* specifies that it is not a function of the agency to enforce measures for security; for example, it has no power of arrest.[292] However, an interception warrant may authorize entry into a place, as well as searches or seizures.[293] The Minister is not permitted to direct the NZSIS to institute surveillance of any person, entity or class of persons, and the chief executive of the NZSIS, the Director of Security, is required to "consult regularly" with the Leader of the Opposition to keep him or her informed regarding security matters.[294]

The chief executive of the NZSIS, the Director of Security, may provide a "security risk certificate" to the Minister of Immigration regarding a non-citizen about whom immigration decisions are to be made.[295] The Minister may decide to remove or deport a person based upon the existence of a security risk certificate.[296]

(a) the protection of New Zealand from acts of espionage, sabotage, terrorism, and subversion, whether or not they are directed from or intended to be committed within New Zealand;
(b) The identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being;
(c) The protection of New Zealand from activities within or relating to New Zealand that
(i) Are influenced by any foreign organization or any foreign person; and
(ii) Are clandestine or deceptive, or threaten the safety of any person; and
(iii) Impact adversely on New Zealand's international well-being or economic well-being: *New Zealand Security Intelligence Service Act 1969*, s. 2.

[291] New Zealand Security Intelligence Service, *Report of the New Zealand Security Intelligence Service: Report to the House of Representatives for the year ended 30 June 2003* http://www.nzsis.gov.nz/ar/nzsisar03.pdf at 6.

[292] *New Zealand Security Intelligence Act 1969*, s. 4(2).

[293] *New Zealand Security Intelligence Service Act 1969*, s. 4A(3B)-(3E).

[294] *New Zealand Security Intelligence Service Act 1969*, s. 4AA(2), (3).

[295] *Immigration Act, 1987*, s. 114D; John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 13.

[296] *Immigration Act, 1987*, s. 114F, s. 114G, s. 114K; John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 13.

Government Communications Security Bureau

The Government Communications Security Bureau (GCSB) is New Zealand's signals intelligence agency. It first became the subject of an enabling statute in 2003, with the passage of the *Government Communications Security Bureau Act 2003*, which continued the GCSB and established it as a department of State.[297]

The GCSB's functions include gathering and analysing foreign intelligence, for example through interception of communications, reporting to the Minister on foreign intelligence, decoding and deciphering, and "cooperation" with other authorities in New Zealand and abroad.[298] The GCSB maintains satellite communications interception stations,[299] "useful to and are accessible by" other intelligence agencies, for example those of the United States and Australia.[300]

Directorate of Defence Intelligence and Security

The Directorate of Defence Intelligence and Security (DDIS) directs or coordinates all Defence intelligence and security activities. It has a mixed military and civilian staff.[301] It is "not a foreign intelligence collection agency," but draws on information from other sources to produce its own classified reports and assessments.[302]

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[297] *Government Communications Security Bureau Act 2003*, s. 3(a).
[298] *Government Communications Security Bureau Act 2003*, s. 8(1)(a)-(d).
[299] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 27.
[300] Inspector-General of Intelligence and Security, *Annual Report of the Inspector-General of Intelligence and Security for the year ending June 1999*, at 9-10, cited in The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 27-28.
[301] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 33.
[302] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 33.

External Assessments Bureau

The External Assessments Bureau assesses and analyzes relevant events outside New Zealand, in support of policy-making.[303] It is located within the Department of Prime Minister and Cabinet. The EAB prepares confidential assessments and reports, including intelligence summaries prepared in consultation with the NZSIS and the GCSB.[304] Reports are made available to the Prime Minister, other Ministers, government departments and agencies, and diplomatic posts overseas.[305]

c. Review, Oversight and Accountability

Law enforcement

The Minister responsible for the New Zealand Police is the Minister of Police.[306] Administratively, the New Zealand Police is divided into twelve Police districts, eleven service centres and the Office of the Commissioner.[307] District Commanders exercise "overall control of policing activities within their Districts in accordance with national planning and administrative guidelines."[308] The Office of Commissioner makes decisions on strategy, governance and performance management. It consists of the Commissioner, the Deputy Commissioner Resources, and the Deputy Commissioner Operations. [309] The Commissioner is appointed by the Governor-General.[310] He or she may issues "general instructions" which all members of the Police must obey.[311]

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[303] See Department of Prime Minister and Cabinet, *Annual Report for the year ended June 30, 2003*, "Output Class D3: Intelligence Assessments on Developments Overseas" http://www.dpmc/govt.nz/dpmc/publications/ar_2003/d3.html,.

[304] See Department of Prime Minister and Cabinet, *Annual Report for the year ended June 30, 2003*, "Output Class D3: Intelligence Assessments on Developments Overseas" http://www.dpmc/govt.nz/dpmc/publications/ar_2003/d3.html.

[305] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 30.

[306] New Zealand Police, "About Us: Structure: Management Team," http://www.police.govt.nz/about/structure.php.

[307] "New Zealand Police," http://www.justice.govt.nz/pubs/reports/2003/DOI-03-05/list-p/police-new-zealand.htm at 1.

[308] "New Zealand Police," http://www.justice.govt.nz/pubs/reports/2003/DOI-03-05/list-p/police-new-zealand.htm at 1.

[309] New Zealand Police, *Annual Report for the year ending 30 June 2003*, "Executive Structure as at 30 June 2003" http://www.police.govt.nz/resources/2003/annual-report/annual-report.pdf at 144; New Zealand Police, "About Us: Structure: Management Team" http://www/police.govt/nz/about/structure.php; "New

Within the Police, Internal Affairs directs the internal disciplinary processes of the Police, and also meets the Commissioner's obligations under the *Police Complaints Authority Act 1988*.[312]

The Police Complaints Authority is the primary mechanism for investigating and resolving complaints against the Police.[313] The Authority is appointed for a term of two to five years, with the possibility of reappointment, [314] on the recommendation of the House of Representatives,[315] and must be a "barrister or solicitor of the High Court."[316]

The Police Complaints Authority has jurisdiction over complaints regarding Police misconduct or neglect of duty, or regarding "any practice, policy or procedure of the Police affecting" the complainant.[317] It may also investigate of its own motion cases in which a member of the Police appears to have caused death or serious bodily harm.[318] The Authority may investigate the complaint itself, "review" Police investigation of the complaint, or "oversee" a Police investigation and give directions to the Police in doing so.[319]

The Commissioner is required to provide to the Authority with all necessary information and assistance.[320] In the course of investigation, the Authority may also compel

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Zealand Police," http://www.justice.govt.nz/pubs/reports/2003/DOI-03-05/list-p/police-new-zealand.htm at 2.

[310] *Police Act 1958*, s. 3(1).

[311] *Police Act 1958*, s. 30.

[312] "New Zealand Police," http://www.justice.govt.nz/pubs/reports/2003/DOI-03-05/list-p/police-new-zealand.htm at 12.

[313] *Police Complaints Authority Act 1988*.

[314] *Police Complaints Authority Act 1988*, s. 5(1).

[315] *Police Complaints Authority Act 1988*, s. 4(2).

[316] *Police Complaints Authority Act 1988*, s. 4(3).

[317] *Police Complaints Authority Act 1988*, s. 12(1)(a).

[318] *Police Complaints Authority Act 1988*, s. 12(1)(b).

[319] *Police Complaints Authority Act 1988*, s. 17, s. 18, s. 19; The Authority appears to have had Police investigate complaints in the past, having hired its own investigators late in 2003: Louisa Cleave, "Workload Surge Taxes Watchdog," The New Zealand Herald, 1 October 2004, http://www.nzherald.co.nz/storyprint.cfm?storyID=3594659

[320] *Police Complaints Authority Act 1988*, s. 21(1).

production of information, documents or things, and may examine persons under oath.[321] However, the Authority's access will be blocked where either the Prime Minister certifies that to do so "might prejudice" New Zealand's security, defence or international relations, or the Attorney General certifies that to do so might prejudice the prevention, investigation or detection of offences, or might involve disclosure of Cabinet secrets, injurious to the public interest.[322]

After an investigation, the Authority concludes whether the investigation revealed any Police activity "contrary to law, unreasonable, unjustified, unfair, or undesirable."[323] Parties shall be informed of the results of investigation "as soon as reasonably practicable…and in such manner as [the Authority] thinks proper."[324] The Authority does not have the power to make binding recommendations to the Commissioner. It is restricted to conveying its opinion, with reasons and any recommendations, to the Commissioner.[325] The Commissioner must notify the Authority of action proposed to be taken in response to Authority recommendations, and give reasons for any proposal not to implement the Authority's recommendations.[326] If dissatisfied with the Commissioner's response, the Authority may send its opinion and recommendation to the Attorney-General and the Minister of Police, and transmit a report on the matter to the Attorney-General for tabling in the House of Representatives.[327]

The Authority must furnish annual reports to the Minister of Justice, to be laid before the House of Representatives.[328] The Authority has the discretion to publish other reports on the exercise of its function or any particular case or cases.[329]

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[321] *Police Complaints Authority Act 1988*, s. 24(1), (2).
[322] *Police Complaints Authority Act 1988*, s. 26(1).
[323] *Police Complaints Authority Act 1988*, s. 27(1), s. 28(1).
[324] *Police Complaints Authority Act 1988*, s. 30.
[325] *Police Complaints Authority Act 1988*, s. 27(2), s. 28(2).
[326] *Police Complaints Authority Act 1988*, s. 29(1).
[327] *Police Complaints Authority Act 1988*, ss. 29(2), (3).
[328] *Police Complaints Authority Act 1988*, ss. 35(1), (2).
[329] *Police Complaints Authority Act 1988*, ss. 34(1), (2). The public release of decisions is "relatively rare: Law and Order Select Committee, "Independent Police Complaints Authority Amendment: Commentary", Presented to the House of Representatives on 17 November 2003, Office of the Clerk of the House of Representatives, www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/18bar2.pdf at 8.

A review of the Police Complaints Authority was conducted in 2000, resulting in broad recommendations for change.[330] Subsequently, the Independent Police Complaints Authority Amendment Bill proposed more limited amendments to the Authority.[331] The Bill would increase the renamed Authority's membership to three persons, including a chairperson who would be a current or former judge. In the view of the Select Committee on Law and Order, these changes were "needed to enhance the Authority's independence."[332] However, the Committee endorsed continuing the Authority's responsibility to maintain secrecy regarding its investigations, and preserving its recommendatory role.[333] The implementation of the new structure has been delayed by the establishment of a Commission of Inquiry in response to allegations about the inadequacy of past Police investigations into allegations of sexual assaults committed by members of the Police.[334]

Intelligence agencies

The Intelligence and Security Committee (ISC) examines the NZSIS' and GCSB's policy, administration, and expenditure, considers any bills in relation to intelligence and security agencies, receives and considers the agencies' annual reports, considers any matter with security or intelligence implications referred to it by the Prime Minister, and reports to the House of Representatives on its own activities.[335] However, the ISC is not

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[330] The Honourable Sir Rodney Gallen, *Review of the Police Complaints Authority* (Wellington: Ministry of Justice, October 2000) http://www.justice.govt.nz/pubs/reports/2001/police_complaints/review_of_pca.doc.

[331] Law and Order Select Committee, "Independent Police Complaints Authority Amendment: Commentary", Presented to the House of Representatives on 17 November 2003, Office of the Clerk of the House of Representatives, www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/18bar2.pdf at 2.

[332] Law and Order Select Committee, "Independent Police Complaints Authority Amendment: Commentary", Presented to the House of Representatives on 17 November 2003, Office of the Clerk of the House of Representatives, www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/18bar2.pdf at 2.

[333] Law and Order Select Committee, "Independent Police Complaints Authority Amendment: Commentary", Presented to the House of Representatives on 17 November 2003, Office of the Clerk of the House of Representatives, www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/18bar2.pdfat 8-9.

[334] See "Related Information and Links: Police under Investigation," The New Zealand Herald, February 3, 2004, http://www.nzherald.co.nz/storyprint.cfm?storyID=3547492; Louisa Cleave, "Workload Surge Taxes Watchdog," The New Zealand Herald, October 1, 2004, http://www.nzherald.co.nz/storyprint.cfm?storyID=3594659; *Police Complaints Authority (Commission of Inquiry into Police Conduct) Act 2004*.

[335] *Intelligence and Security Committee Act 1996*, s. 6(1).

permitted to inquire into any matter within the jurisdiction of the Inspector-General of Intelligence and Security (see below), any complaint that could be resolved under another enactment, or any matter that is "operationally sensitive, including any matter that relates to intelligence collection and production methods or sources of information."[336]

The ISC consists of the Prime Minister, the Leader of the Opposition, two members of the House of Representatives nominated by the Prime Minister, and one member of the House of Representatives nominated by the Leader of the Opposition.[337] It has the power to require the chief executive of an intelligence and security agency to appear before it, and to request any other person to attend to give evidence or to produce documents or information.[338] However, the person may refuse to disclose information that is, in the view of the agency's chief executive, "sensitive" and not safe to disclose.[339] Reports to the House of Representatives must have regard to the requirements of secrecy.[340]

The Inspector-General of Intelligence and Security (IGIS) deals with complaints regarding and compliance with the law by the NZSIS and the GCSB, within statutorily prescribed limits. The IGIS is appointed by the Governor-General on the recommendation of the Prime Minister, following consultation with the Leader of the Opposition.[341] The appointee must be a retired Judge of the High Court of New Zealand.[342] The term of appointment is three years, and reappointment is permitted.[343]

The IGIS may inquire of its motion or at the Minister's direction into any matter relating to compliance by an intelligence and security agency (the NZSIS, the GCSB) with New Zealand law.[344] It may also inquire into any complaint by a "New Zealand person"[345] or

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[336] *Intelligence and Security Committee Act 1996*, s. 6(2).
[337] *Intelligence and Security Committee Act 1996*, s. 7(1).
[338] *Intelligence and Security Committee Act 1996*, ss. 14(1), (2).
[339] *Intelligence and Security Committee Act 1996*, ss. 17(1), (2).
[340] *Intelligence and Security Committee Act 1996*, s. 18(2)(a).
[341] *Inspector General of Intelligence and Security Act 1996*, s. 5(2).
[342] *Inspector General of Intelligence and Security Act 1996*, s. 5(3).
[343] *Inspector General of Intelligence and Security Act 1996*, s. 6(1).
[344] *Inspector General of Intelligence and Security Act 1996*, s. 11(1)(a).
[345] *Inspector General of Intelligence and Security Act 1996*, s. 2(1) defines this term to include citizens, residents, and corporations incorporated in New Zealand.

an employee or former employee of such an agency, that he or she was adversely affected by the agency.[346] None of the IGIS' functions may be exercised unless a New Zealand person or an employee or former employee of the agency "has or may have been adversely affected," or the law of New Zealand may have been contravened.[347] Furthermore, the Minister's agreement is required should the IGIS wish to inquire into particular activities in the absence of a complaint.[348]

The IGIS may review the effectiveness of procedures to ensure compliance with the requirements for securing and executing interception warrants.[349] In addition, it may prepare programs for the "oversight and review" of the agencies, and, if approved by the Minister, carry them out.[350]

The IGIS is prohibited from inquiring into any action taken by the Minister,[351] or, "except to the extent strictly necessary for the performance of his or her functions…into any matter that is operationally sensitive, including any matter that relates to intelligence collection and production methods or sources of information."[352]

The IGIS regulates its own procedures.[353] It may require testimony under oath,[354] and may receive evidence otherwise inadmissible in a court of law.[355] The IGIS has power of entry onto agency premises, with notice to the chief executive.[356] The IGIS has access to all security records relevant to an inquiry[357] except where the Minister certifies that disclosure would prejudice certain interests and that disclosure should not be made or should be limited.[358]

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[346] *Inspector General of Intelligence and Security Act 1996*, s. 11(1)(b).
[347] *Inspector General of Intelligence and Security Act 1996*, s. 11(2).
[348] *Inspector General of Intelligence and Security Act 1996*, s. 11(c).
[349] *Inspector General of Intelligence and Security Act 1996*, s. 11(d).
[350] *Inspector General of Intelligence and Security Act 1996*, ss. 11(e), (f).
[351] *Inspector General of Intelligence and Security Act 1996*, s. 11(3).
[352] *Inspector General of Intelligence and Security Act 1996*, s. 11(4).
[353] *Inspector General of Intelligence and Security Act 1996*, s. 19(8).
[354] *Inspector General of Intelligence and Security Act 1996*, ss. 19(3), 23(2).
[355] *Inspector General of Intelligence and Security Act 1996*, s. 19(5).
[356] *Inspector General of Intelligence and Security Act 1996*, s. 21.
[357] *Inspector General of Intelligence and Security Act 1996*, s. 20(1).
[358] *Inspector General of Intelligence and Security Act 1996*, s. 26(3).

Like the Police Complaints Authority, the IGIS cannot make binding recommendations. On the conclusion of an inquiry, it prepares a report with conclusions and recommendations for the Minister and the chief executive of the relevant agency,[359] and in the case of a complaint also advises the complainant of his or her conclusions "in terms that will not prejudice the security or defence of New Zealand" or its international relations.[360] It may report to the Minister on an agency's compliance with recommendations, and on the adequacy of any post-inquiry remedial or preventative measures.[361] The IGIS also makes an annual report to the Minister in charge of intelligence agencies and the Prime Minister (who are traditionally one and the same).[362] The Prime Minister tables a version of this report in the house, with certain material excluded.[363]

The position of Inspector-General has recently come under scrutiny, prompted by the case of asylum seeker Ahmed Zaoui, the subject of New Zealand's first security risk certificate. Mr. Zaoui lodged a complaint with the Inspector-General. However, the High Court ruled that the Inspector-General's comments in a media interview raised a "real possibility of apparent bias."[364] As a result, the Inspector-General, Laurie Grieg, resigned in March 2004.[365]

The issuance of warrants to intercept communications is subject to special oversight. The office of the Commissioner of Security Warrants was created with amendments to the *NZSIS Act* in 1999.[366] The Commissioner must be a retired High Court judge,[367] and the

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[359] *Inspector General of Intelligence and Security Act 1996*, s. 25(1).
[360] *Inspector General of Intelligence and Security Act 1996*, s. 25(2).
[361] *Inspector General of Intelligence and Security Act 1996*, s. 25(5).
[362] *Inspector General of Intelligence and Security Act 1996*, s. 27(1).
[363] *Inspector General of Intelligence and Security Act 1996*, ss. 27(3), (4).
[364] *Ahmed Zaoui v. The Honourable Laurence Grieg* HC AK CIV-2004-404-317 (31 March 2004).
[365] See Catherine Masters and Helen Tunnah, "'Bias' Ruling Bows SIS Watchdog in Zaoui Case," The New Zealand Herald, 1 April 2004 http://www.nzherald.co.nz/storyprint.cfm?storyID=3558239.
[366] *New Zealand Security Intelligence Service Amendment Act (No. 2) 1999*; John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 12.

office is part of the Department of the Prime Minister and Cabinet.[368] The Commissioner is appointed by the Governor General for a three year term[369] on the recommendation of the Prime Minister following consultation with the Leader of the Opposition.[370] Any domestic interception warrant must be issued jointly by both the Commissioner of Security Warrants and the Minister in charge of the NZSIS (normally the Prime Minister).[371] The criteria that must be met in order for a warrant to be issued are: the information being sought must be necessary to detect activities prejudicial to security or to gather foreign intelligence essential to security, the value of the information must justify the particular interception or seizure, the information sought must be unlikely to be gained by any other means, and the information must not be legally privileged in court proceedings.[372] The Minister and the Commissioner must be satisfied based on evidence given on oath by the applicant for the warrant that the criteria have been met.[373] Warrants to obtain information about foreign capabilities, intentions or activities are issued by the Minister in charge of the NZSIS and GCSB in consultation with the Minister of Foreign Affairs and Trade.[374]

Interceptions by the GCSB are generally subject to the scheme set out above. It is prohibited from targeting the communications of New Zealand citizens or permanent

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[367] *New Zealand Security Intelligence Service Act 1969*, s. 5A(3); John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 12.

[368] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 25.

[369] *New Zealand Security Intelligence Service Act*, s. 5B(1), s. 5A(2).

[370] Department of Prime Minister and Cabinet, "Domestic and External Security Group," http://www.dpmc.govt.nz/dess/index.htm.

[371] *New Zealand Security Intelligence Service Act 1969*, s. 4A(1); John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 12.

[372] *New Zealand Security Intelligence Service Act 1969*, s. 4A(1); The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 24.

[373] *New Zealand Security Intelligence Service Act 1969*, s. 4A(2).

[374] *New Zealand Security Intelligence Service Act 1969*, s. 4A(5); Government Communications Security Bureau Act 2003, s. 17(5); The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 25.

residents.[375] However, warrants to intercept foreign communications are required by the GCSB only where physical installation of an interception device is involved.[376] Authorization to access the computer system of a foreign organization is provided by the Minister, in consultation with the Minister of Foreign Affairs and Trade, based on the written application of the Director.[377]

Policy Coordination and Oversight

The Officials Committee for Domestic and External Security Coordination (ODESC) exercises "policy oversight of the New Zealand intelligence community in respect of foreign intelligence matters."[378] It is chaired by the Chief Executive of the Department of Prime Minister and Cabinet, and attended by the chief executives or deputies of Police (when matters of counter-terrorism or management of terrorist incidents are involved)[379] Foreign Affairs and Trade, Defence, Defence Force, Civil Defence and Emergency Management, NZSIS, the EAB, and the GCSB.[380] ODESC examines the intelligence agencies' budget bids in respect of foreign intelligence collection and makes recommendations to the Prime Minister for inclusion in the Estimates. It provides policy direction to agencies regarding collection and production of foreign intelligence reports and assessments. Further, it advises Cabinet on policy and operational matters regarding counter-terrorism and management of terrorist incidents. An ODESC working group now receives Police recommendations for inclusion on the list of designated terrorist entities, and considers whether to advance them to the Prime Minister.[381]

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[375] *Government Communications Security Bureau Act 2003*, s. 14.
[376] *Government Communications Security Bureau Act 2003*, s. 15(1), s. 16(2).
[377] *Government Communications Security Bureau Act 2003*, s. 19. There is no requirement for authorization when access is limited to access to "communication links" between computers or to remote terminals: s. 16(2).
[378] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 36.
[379] The Domestic and External Security Secretariat, Department of the Prime Minister and Cabinet, "Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies" (Wellington: December 2000, Domestic and External Security Secretariat) at 37.
[380] John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 17, 51.
[381] John E. Smith, "New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities," December 2003, Ian Axford Fellowship Report, U.S. Department of Justice http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf at 54.

V. NORWAY

a. Introduction

Norway is a constitutional monarchy with a parliamentary system of governance. Power is divided between three branches: legislative, executive and judicial. The legislative branch is the parliament (« *Stortinget* »), consisting of a lower chamber (« *Odelsting* ») and an upper chamber (« *Lagting* »). The executive branch consists of the monarch, the prime minister and his or her cabinet.[382]

Norway is a unitary state (though it has 19 'administrative divisions' (« *fylker* »)); and policing, security and intelligence responsibility therefore fall to the national government.

The Norwegian government has undertaken a number of national security measures in recent years, including the appointment of a Commission on the Vulnerability of Society to report on measures to increase security and safety[383]; and the establishment of a Directorate of National Protection[384], and a Center for Information Security in 2002.[385]

A notable feature of the Norwegian review landscape is its Committee for Oversight of Intelligence, Surveillance and Security Services. This Committee has jurisdiction over the intelligence-collection activities of government bodies, no matter who conducts them. In practice, this means that it principally reviews Norway's three intelligence agencies,

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[382] Norway, Official Site in the UK, "General info", http://www.norway.org.uk/facts/political/general/general.htm. See also the Norway government's information site in English: http://www.odin.dep.no/odin/engelsk/bn.html ; Statewatch, "Norway: police and security agencies", http://www.poptel.org.uk/cgi-bin/dbs2/statewatch?query=Norway&mode=records&row_id=18406; and U.S. Department of State, Background Note: Norway, http://www.state.gov/r/pa/ei/bgn/3421.htm.

[383] Ministry of Justice and the Police, "Statement on Safety and Security of Society", Report no. 17 to Storting (2001-2002), p. 2, http://www.odin.dep.no/jd/engelsk/publ/p10001858/012101-040002/dok-bn.html.

[384] Ministry of Justice and the Police, "Statement on Safety and Security of Society", Report no. 17 to Storting (2001-2002), p. 3, http://www.odin.dep.no/jd/engelsk/publ/p10001858/012101-040002/dok-bn.html.

[385] Lillian Røstad and Maria Bartnes Dahl, Center for Information Security, "Experiences from establishing a Center for Information Security in Norway", http://www.terena.nl/conferences/tnc2003/programme/papers/p1c1.pdf.

but other intelligence-collection services within government fall within its jurisdiction. The Committee investigates complaints, and also conducts reviews on its own initiative.

b. Law Enforcement and Intelligence

National police force

There is only one police force in Norway: the Norwegian Police (« *Norske Politiet* »).[386] The force is established pursuant to the *Police Act*, which provides that police "shall through preventive, enforcing and helping activities contribute to society's overall effort to promote and consolidate the citizens' security under the law, safety and welfare in general."[387]

There are 27 local police districts in Norway, each with a Chief of Police.[388] There are also five central police institutions, including the National Criminal Investigation Service (« *Kripos* »), which assists the local police with technical and tactical expertise; and the Police Security Service (« *Politiets Sikkerhetstjeneste* »).

Police Security Service

The Police Security Service is a civilian agency within the national police force, which, since 2002, has had a separate statutory basis.[389] The establishment of a statutory basis for the Police Security Service, as well as other re-organization in the security intelligence and review landscape in Norway, followed a report by the Lund Commission, which was established in 1994 to "inquire into all allegations of illegal or irregular surveillance of Norwegian citizens, by any of the intelligence and security agencies from 1945 until the present."[390]

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[386] National Police Directorate, "A Short Introduction to the Police in Norway", http://www.politi.no/politiet/NPD.pdf.

[387] *Police Act*, no. 53 of 4 August 1995. English version, without subsequent amendments, available at http://www.ub.uio.no/ujur/ulov/english.html.

[388] National Police Directorate, "A Short Introduction to the Police in Norway", http://www.politi.no/politiet/NPD.pdf.

[389] This was done by an amendment to the *Police Act*, no. 53 of 4 August 1995, adding sections 17a, 17b, 17c. See Fredrik Sejersted, "Intelligence Oversight in Norway" (Geneva Centre for the Democratic Control of Armed Forces: 2003) ("*Intelligence Oversight 1*"), p. 7.

[390] Fredrik Sejersted, "Intelligence Oversight in a Small Peaceful Country: The Case of Norway" ("*Intelligence Oversight 2*"), p. 6. This article is unpublished, but an abridged version is forthcoming in

The Police Security Service is tasked with "preventing terrorism, espionage and threats to internal security".[391] It is considered one of Norway's three intelligence agencies, and in recent years has been subject to the greatest degree of scrutiny by Norway's monitoring committee for intelligence agencies[392].

It is unclear to what extent Norway's ordinary police force is involved in counter-terrorism and intelligence, including intelligence-led policing, given the existence of the Police Security Service. More research will be required.

Norway has two other intelligence agencies: the Intelligence Service (« *Etterretningstjenesten* »), and the National Security Authority (« *Nasjonal Sikkerhetsmyndighet* »).[393]

Intelligence Service

The Intelligence Service gathers and analyses foreign intelligence, principally signals intelligence.[394] According to its 1998 governing legislation, the Intelligence Service is mandated to "procure, process and analyse information regarding Norwegian interests viewed in relation to foreign states, organizations or private individuals, and in this context prepare threat analyses and intelligence assessments to the extent that this may help to safeguard important national interests."[395] This mandate includes the

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Hans Born, Loch Johnson and Ian Leigh (eds.), *Who is Watching the Spies? Establishing Intelligence Services Accountability* (Dulles, VA: Brasseys, 2005).

[391] National Police Directorate, "A Short Introduction to the Police in Norway", http://www.politi.no/politiet/NPD.pdf.

[392] See Leif Mevik, Chair of the Intelligence Oversight Committee, "Parliamentary Oversight of the Intelligence Services: the Norwegian Experience", paper presented at the Workshop on « Parliamentary Oversight of the Security Sector », organized by the Geneva Centre for the Democratic Control of Armed Forces and the Romanian Parliament, 29-30 March 2004, (located at http://www.dcaf.ch/news/Handbook_Bucharest04/Mevik.pdf), p. 3, in which it is noted that the Security Service receives the greatest number of inspections (per the *Instructions for Monitoring of Intelligence, Surveillance and Security Services*); and Sejersted, *Intelligence Oversight 2*, p. 19, in which the author notes that the Police Security Service generates the most complaints.

[393] Sejersted, *Intelligence Oversight 2*, p. 3.

[394] Sejersted, *Intelligence Oversight 2*, p. 3.

[395] Act relating to the Norwegian Intelligence Service, 20 March 1998, s. 3, http://www.ub.uio.no/ujur/ulovdata/lov-19980320-011-eng.pdf .

"procurement of information concerning international terrorism."[396] The Service is expressly precluded on Norwegian territory from monitoring or in any other covert manner procuring information concerning Norwegian individuals or entities.[397]

The Intelligence Service is organized as part of Norway's Armed Forces, and reports to the Chief of Defence and the Minister of Defence.[398] It was formerly a military agency, but its staff today is mostly civilian.[399]

National Security Authority

According to its governing legislation, the National Security Authority ("NSA") "coordinate(s) protective security measures and oversee(s) the state of security" of Norway. It is also "the executive body in relation to other countries and international organizations."[400] In other words, it is responsible for proactive national security, identifying national objects of special interest, and reducing Norway's vulnerability to internal and external threats.[401] The NSA is also the highest authority in Norway for the issuance and withdrawal of personnel security clearances, the classification and de-classification of information, and the physical and electronic securing of governmental and other sensitive premises against espionage.[402] The NSA does not conduct investigations or operations[403], though it has "unhampered access to any area where there is sensitive information or a sensitive object."[404] It was established by legislation in 2001[405], replacing the former military Defence Security Service. It is organized as a

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[396] Act relating to the Norwegian Intelligence Service, 20 March 1998, s. 3, http://www.ub.uio.no/ujur/ulovdata/lov-19980320-011-eng.pdf .
[397] Act relating to the Norwegian Intelligence Service, 20 March 1998, s. 4, http://www.ub.uio.no/ujur/ulovdata/lov-19980320-011-eng.pdf .
[398] Sejersted, *Intelligence Oversight 2*, p. 3; Act relating to the Norwegian Intelligence Service, 20 March 1998, s. 2.
[399] Sejersted, *Intelligence Oversight 2*, p. 3.
[400] *Act relating to Protecting Security Services*, no. 10 of 20 March 1998, s. 8.
[401] See http://www.nationmaster.com/encyclopedia/Nasjonal-Sikkerhetsmyndighet.
[402] Sejersted, *Intelligence Oversight 2* , p. 5.
[403] Sejersted, *Intelligence Oversight 2*, p. 5.
[404] *Act relating to Protecting Security Services*, no. 10 of 20 March 1998, s. 10.
[405] *Act relating to Protecting Security Services*, no. 10 of 20 March 1998, which came into force in 2001. See Sejersted, *Intelligence Oversight 1*, p. 7.

civilian directorate within the Ministry of Defence[406], but appears to report to the Ministry of Justice and the Police.[407]

The Norwegian government also has a Coordinating and Advisory Board for the Intelligence and Security Services, which coordinates and advises responsible ministers on information exchange between Norway's three intelligence bodies.[408] The Board is comprised of the three agency heads, and three high-ranking officials from the ministries.[409]

c. Review, Oversight and Accountability

National police and Police Security Service

The Police Security Service is subject largely to the same review and oversight mechanisms to which the ordinary police are subject, but it is also subject to the scrutiny to which Norway's intelligence agencies are subject. This section first discusses the review and oversight to which the ordinary police and Police Security Service are both subject; and then discusses the structures in place specifically for intelligence agencies, including the Security Service.

The Ministry of Justice and Police is responsible for Norway's police.[410] The National Police Directorate "manages and coordinates" the police on behalf of the Ministry, "in order to ensure a predictable, efficient and flexible service".[411] It "ensures that police activities contribute to attain political goals and priorities set by the government….(and) exercises control functions to make sure that allocated resources are fully and adequately

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[406] Sejersted, *Intelligence Oversight 2*, p. 5.
[407] See http://www.nationmaster.com/encyclopedia/Nasjonal-Sikkerhetsmyndighet.
[408] *Intelligence Oversight 1*, p. 46. See also Ministry of Justice and the Police, "Statement on Safety and Security of Society", Report no. 17 to Storting (2001-2002), p. 4, http://www.odin.dep.no/jd/engelsk/publ/p10001858/012101-040002/dok-bn.html.
[409] Sejersted, *Intelligence Oversight 2*, p. 46.
[410] Ministry of Justice site, http://www.odin.dep.no/jd/engelsk. See also *Police Act*, no. 53 of 4 August 1995, ss. 15, 29.
[411] National Police Directorate, http://www.politi.no/politiet/english.shtml.

utilized, and that all police activity is in accordance with the rules, regulations and legislation applying to the police service."[412]

The National Police Directorate, however, does not have authority over the Police Security Service. The Security Service reports directly to the Minister of Justice.[413]

Norway's police force, including the Security Service, are subject to a complaints-based body called the Special Investigating Body for Police Matters (« *SEFO* »).[414] More research on this body is required, but it would appear that SEFO is an investigation body that is "internal" to the police[415]; that it has the power to "prosecute"[416]; that it has divisions in Norway's 10 prosecutorial "regions", each division consisting of a judge, a lawyer and a police officer[417]; and that calls have been made for its reasons for decisions to be made public[418].

The police are also subject to judicial scrutiny, insomuch as their investigative activities are reviewed by the courts in the context of warrant authorizations, prosecutions etc. The Police Secret Service are subject to the same legal requirements as the ordinary police, except that the court decisions are often "secret",[419] and the Police Secret Service is

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[412] National Police Directorate, "A Short Introduction to the Police in Norway", http://www.politi.no/politiet/NPD.pdf .
[413] National Police Directorate, "A Short Introduction to the Police in Norway", http://www.politi.no/politiet/NPD.pdf .
[414] Sejersted, *Intelligence Oversight 2*, p. 24.
[415] See for example Aftenposten: News from Norway, "Police foil new bank robbery", August 16, 2004, http://www.aftenposten.no/english/local/article848782.ece; Norway Post, « Police expelled au-pair unlawfully », 3 June 1999, http://www.norwaypost.no/content.asp?cluster_id=1507&folder_id=1; Norway Post, " High number of police officers charged", January 30, 1999, http://www.norwaypost.no/content.asp?cluster_id=314&folder_id=1.
[416] Norway, Royal Ministry of Foreign Affairs Press Division, Norway Daily No. 160/02, "Call for SEFO's investigations to be made public", August 26, 2002, http://odin.dep.no/odinarkiv/norsk/dep/ud/2002/eng/032091-210293/dok-bn.html.
[417] Council of Europe, Legal Affairs, "Norway: Info", 29 May 2002, http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Conferences_and_high-level_meetings/European_Public_Prosecutors/PROC%20INFO%20NORWAY%20English.asp.
[418] Norway, Royal Ministry of Foreign Affairs Press Division, Norway Daily No. 160/02, "Call for SEFO's investigations to be made public", August 26, 2002, http://odin.dep.no/odinarkiv/norsk/dep/ud/2002/eng/032091-210293/dok-bn.html.
[419] Sejersted, *Intelligence Oversight 2*, p. 5.

subject to review by the Committee for Oversight of the Intelligence, Surveillance and Security Services (discussed below).

The Police Security Service is further subject to scrutiny by a "special Inspection Service" housed within the Ministry of Justice and the Police. The work of this Inspection Service "to some extent parallels" the work of the Committee for Oversight of the Intelligence, Surveillance and Security Services (discussed below), but its monitoring "focuses more on the efficiency and effectiveness" of the Security Service, than the Committee's monitoring does.[420]

Police Security Service and Norway's other two Intelligence Agencies

Executive monitoring of Norway's intelligence agencies is mainly conducted within the responsible ministries: the Police Security Service is under the direction of the Ministry of Justice and Police; the National Security Authority is under the direction of the Ministry of Defence, and the Intelligence Service is under the direction of the Chief of Defence and the Ministry of Defence.

There is also a Coordination Committee for the Intelligence Service, which is comprised of representatives of the Ministry of Defence and the Office of the Auditor General. The Coordination Committee "focuses primarily on the accounts of the Intelligence Service, and its economic efficiency", but also inspects installations, and checks that military and administrative directives are respected. The Coordination Committee reports to the Minister of Defence.[421]

Review of Norway's intelligence agencies is conducted by the Committee for Oversight of the Intelligence, Surveillance and Security Services (« *Utvalget for kontroll med etterretnings-, overvåknings- og sikkerhetstjeneste* ») (the "Intelligence Oversight Committee"), which has jurisdiction over all "intelligence, surveillance and security

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[420] Sejersted, *Intelligence Oversight 2*, p. 24.
[421] Sejersted, *Intelligence Oversight 2*, p. 24.

services"[422]. In other words, the jurisdiction of the Intelligence Oversight Committee is defined functionally, rather than by agency.[423] It therefore has jurisdiction not only over Norway's three intelligence agencies – the Intelligence Service, the Police Security Service and the National Security Authority[424], but also over any intelligence activities conducted by other governmental bodies.[425]

The Committee's purpose is:

1. to ascertain and prevent any exercise of injustice against any person, and to ensure that the means of intervention employed do not exceed those required under the circumstances,
2. to ensure that the activities do not involve undue damage to civic life,
3. to ensure that the activities are kept within the framework of statute law, administrative or military directive and non-statutory law.[426]

The Committee is also bound to "show consideration for national security and relations with foreign powers."[427]

The Committee is required to "regularly monitor the practice of intelligence, surveillance and security services", "investigate all complaints from persons and organizations" and "on its own initiative deal with all matters and factors that it finds appropriate to its purpose, and particularly matters that have been subjected to public criticism."[428]

The Committee may not "instruct" the agencies, nor "be used by these for consultations". This prohibition on consultations was set out in the statute, according to one commentator, in order to preclude the possibility of the Committee exercising ongoing oversight of the agencies, and thereby compromising "the need for critical independence".[429]

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[422] *Act relating to the Monitoring of Intelligence, Surveillance and Security Services*, no. 7 of 3 February 1995 ("*Intelligence Monitoring Act*"), ss. 1, 3.
[423] Sejersted, *Intelligence Oversight 2*, p. 7.
[424] Sejersted, *Intelligence Oversight 2*, p. 2.
[425] Sejersted, *Intelligence Oversight 2*, p. 7.
[426] *Intelligence Monitoring Act*, s. 2.
[427] *Intelligence Monitoring Act*, s. 2.
[428] *Intelligence Monitoring Act*, s. 3.
[429] Sejersted, *Intelligence Oversight 2*, p. 17. Sejersted also discusses the « grey zone between consultations and discussions », and « the difficulty to maintain fully…the principle of

The Committee has the power to compel documents and testimony,[430] but it does not have access to "internal documents" of the ministries.[431] The Chair of the Committee has also recently stated that it does not ask for access to files pertaining to the identity of sources/agents or which reveal capacities of foreign cooperating services.[432] The Committee files annual reports with the parliament, which are unclassified[433], unless the Committee views that the parliament "should familiarize itself with classified information".[434]

The Committee is comprised of seven members, who are elected by the Norwegian parliament for a period of five years[435]. Sitting members of the parliament are not eligible[436], but "care is…taken to ensure that (the Committee appointees) reflect the main political interests represented in parliament."[437] They must have the highest level of national security classification and are bound to a duty of secrecy.[438]

VI. SWEDEN

a. Introduction

Sweden is a constitutional monarchy and parliamentary democracy. Power is divided between three branches: the legislature, known as the Chamber (« *Riksdag* »); the executive, consisting of the monarch, the prime minister and her or his cabinet ministers; and the judiciary.[439]

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retrospective oversight…when it comes to operations that run for some period of time. » See also Sejersted, *Intelligence Oversight 1*, pp. 30ff.

[430] *Intelligence Monitoring Act*, ss. 4, 5.

[431] *Instructions for Monitoring of Intelligence, Surveillance and Security Services*, s. 9.

[432] Leif Mevik, « Parliamentary Oversight of the Intelligence Services : the Norwegian Experience », paper presented at the Workshop on « Parliamentary Oversight of the Security Sector », organized by the Geneva Centre for the Democratic Control of Armed Forces and the Romanian Parliament, 29-30 March 2004, p. 4.

[433] *Intelligence Monitoring Act*, s. 8.

[434] *Instructions for Monitoring of Intelligence, Surveillance and Security Services*, s. 13.

[435] *Intelligence Monitoring Act*, s. 1; *Instructions for Monitoring of Intelligence, Surveillance and Security Services*, s. 1.

[436] Sejersted, *Intelligence Oversight 2*, p. 9.

[437] Sejersted, *Intelligence Oversight 2*, p. 10.

[438] *Intelligence Monitoring Act*, s. 9.

[439] See http://www.sweden.se.

The Swedish government has taken a number of national security measures in recent years. It recently passed the *Act on Criminal Responsibility for Terrorist Crime*, which, among other things, created terrorism offences and increased the right to use secret surveillance[440], as well as the *Act on Extradition from Sweden under the European Arrest Warrant*[441], both of which were based on European Union directives.[442] It also established a commission to review Sweden's emergency preparedness following 9/11[443], created the Swedish Emergency Management Agency[444], and allocated separate funds for "strengthening Swedish emergency preparedness".[445]

Sweden's national security landscape is notable because its national police service includes a Security Service (« *Säpo* »), which engages in crime prevention, counter-terrorism, and security intelligence[446]; and because its principal complaints-processing body, the Parliamentary Ombudsmen's Office, has jurisdiction over all public authorities and officials, including all law enforcement and intelligence bodies.[447]

b. Law Enforcement and Intelligence

National police service

Sweden has a national police service (« *Rikspolis* »). The service is administered and supervised by the National Police Board, which is responsible to the Minister of Justice. It comprises police authorities for each of Sweden's 21 counties, as well as a National

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[440] (2003:148).
[441] (2003:1156).
[442] Swedish Helsinki Committee for Human Rights, *Annual Report 2003*, p. 9.
[443] Swedish Security Service, *Annual Report 2003*, p. 2 (http://www.securityservice.se/).
[444] Ann-Louise Eksborg, Director-General, Swedish Emergency Management Agency, "The Swedish Emergency Management Agency: Experiences and Conclusions After Two Years", p. 1 (http://www.krisberedskapsmyndigheten.se/3673.epibrw).
[445] Ann-Louise Eksborg, Director-General, Swedish Emergency Management Agency, "The Swedish Emergency Management Agency: Experiences and Conclusions After Two Years", p. 1 (http://www.krisberedskapsmyndigheten.se/3673.epibrw).
[446] Swedish Security Service, *Annual Report 2003*, p. 2 (http://www.securityservice.se/).
[447] The *Act with Instructions for the Parliamentary Ombudsmen* (1986:765), art. 2, (http://www.jo.se/Page.asp?MenuId=37&MainMenuId=12&ObjectClass=DynamX_Document&Id=575). See also the summary in English at the end of the Parliamentary Ombudsmen's Report for the period 1 July 2000 to 30 June 2001 (http://www.riksdagen.se/debatt/0001/forslag/jo1/jo1.pdf).

Laboratory of Forensic Science, a National Criminal Investigation Department, and a Security Service (described below).[448]

The national police service also has a National Counter-Terrorism Unit (NCTU). This Unit provides assistance to the police authorities, in particular in major surveillance operations or underwater searches. Members of the NCTU must have not only at least 5 years of experience as a police officer, but also 2 years of special training and operational work.[449]

Security Service

The duties of the Security Service (« *Säpo* ») are defined in ordinances containing instructions to the National Police Board (1989: 773), and in an ordinance containing instructions to the Security Service (2002 : 1050).[450] According to this 2002 ordinance[451], the Security Service is mandated to "direct and perform police activities aiming at the prevention and detection of offences against national security, and also – even if activities do not refer to such offences – police activities relating to counter-terrorism…". The Security Service "gathers intelligence on various matters that may be used to combat international terrorism or to counter threats to our democratic system and national security." [452] The National Police Board, in its 2001 "Presentation" of the Swedish police, called these duties "security intelligence".[453]

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[448] See National Police Board, "Polisen: A presentation of the Swedish Service", p. 4, http://www.polisen.se/inter/mediacache//4347/4734/3928/1_Sapo_varen_03_eng.pdf. For more information on the national police service, see National Police Board, "The Police Act with commentary", http://www.polisen.se/inter/mediacache/4347/4734/2671/policeact_pdf.pdf.

[449] See National Police Board, "Polisen: A presentation of the Swedish Service", p. 18, http://www.polisen.se/inter/mediacache//4347/4734/3928/1_Sapo_varen_03_eng.pdf.

[450] Swedish Security Service, *Annual Report 2002*, p.5.

[451] (2002 : 1050).

[452] National Police Board, "Polisen: A presentation of the Swedish Service", p. 23, http://www.polisen.se/inter/mediacache//4347/4734/3928/1_Sapo_varen_03_eng.pdf.

[453] National Police Board, "Polisen: A presentation of the Swedish Service", p. 23, http://www.polisen.se/inter/mediacache//4347/4734/3928/1_Sapo_varen_03_eng.pdf.

The Security Service works closely with the "regular police service" in order to prevent crime.[454] That is, "regular police units perform investigations and operational field work while the (Security Service) provides crime intelligence, resources and methodological know-how. It also works closely with government agencies within the Swedish Total Defence System[455], and uses a "central register" for the compilation of all the intelligence which it collects.

The Security Service describes its "prime task" as "crime prevention", and states that "(t)o be able to prevent and detect crimes against national security, (it) must engage in security intelligence gathering (meaning intelligence) that may be of importance to external and internal security and to counter-terrorism activities."[456] The Security Service's work includes intelligence processing, analysis and national security threat assessments.[457]

In 2003, the Commission mandated to review Sweden's emergency preparedness following 9/11 recommended that the Security Service be reconstituted as a service directly reporting to the government, rather than to the Minister of Justice.[458]

Military Intelligence and Security Service

Sweden's Military Intelligence and Security Service collects and analyses intelligence related to foreign military threats to Swedish security. This body was first placed on a statutory basis in 2000.[459] It operates under the Armed Forces.

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[454] National Police Board, "Polisen: A presentation of the Swedish Service", p. 23, http://www.polisen.se/inter/mediacache//4347/4734/3928/1_Sapo_varen_03_eng.pdf.
[455] National Police Board, "Polisen: A presentation of the Swedish Service", p. 23, http://www.polisen.se/inter/mediacache//4347/4734/3928/1_Sapo_varen_03_eng.pdf.
[456] Swedish Security Service, *Annual Report 2003*, p. 3 (http://www.securityservice.se/). See also Swedish Security Service, *Annual Report 2002* ((http://www.securityservice.se/).
[457] Swedish Security Service, *Annual Report 2003*, p. 3 (http://www.securityservice.se/).
[458] Swedish Security Service, *Annual Report 2003*, p. 2 (http://www.securityservice.se/).
[459] *Defence Intelligence Activity Act* (2000:131); related ordinance (2000:131).

National Defence Radio Centre

Sweden's National Defence Radio Centre (« Försvarets Radioanstalt »)("FRA") carries out signals and communications intelligence, and operates under the Armed Forces.

Other

The Joint Military Intelligence and Security Directorate (« Militarens Underattelse och Såkerhetstjansten »)("MUST") manages "the gathering, processing and dissemination of military intelligence within the Swedish Armed Forces and intelligence production at the National Swedish Defence Radio Centre"[460].

Other bodies also play minor roles in Swedish intelligence collection and analysis: the Swedish Customs Service, the National Police Board, Swedish National Space Board, Ministries of Foreign Affairs, Justice and the Interior (MR).

In addition to those bodies which gather intelligence, the Swedish Emergency Management Agency (SEMA), which was created in July 2002, uses "research and intelligence to compile knowledge" which might be "useful" to Swedish public authorities. SEMA is also charged with coordination of information security in Sweden. The National Defence Radio Centre assists SEMA by contributing expertise.[461]

c. Review, Oversight and Accountability

The principal mechanisms for oversight and review of Sweden's law enforcement and intelligence bodies are the National Police Board, the Parliamentary Ombudsmen's Office, the Register (or Records) Board, the parliamentary Committee on the Constitution, and the Chancellor of Justice. All these bodies have jurisdiction over the national police service and the Security Service; and all but the National Police Board have jurisdiction over the intelligence agencies. In addition, a new committee to monitor

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[460] Swedish Armed Forces, http://www.mil.se/article.php?lang=E&id=9598.

[461] Ann-Louise Eksborg, Director-General, Swedish Emergency Management Agency, "The Swedish Emergency Management Agency: Experiences and Conclusions After Two Years", p. 3 (http://www.krisberedskapsmyndigheten.se/3673.epibrw).

the Military Intelligence and Security Service was also created in 2000, when this agency was given its statutory basis.[462]

Sweden has been criticized by human rights bodies for its lack of "independent body to investigate police misconduct".[463]

National Police Board

The national police service and the Security Service are under the jurisdiction of the National Police Board (« *Rikspolisstyrelsen* »). The National Police Board is the central administrative and supervisory authority of the police service. It "performs inspections with a view to checking that the work of the police and the Security Service is carried out efficiently in accordance with the directives issued by the government and parliament and with due observance of the legal rights of the individual".[464] The ability of the National Police Board to adequately monitor the activities of the Security Service has been questioned, however, by another body which scrutinizes the police and Security Services: the Register Board (described below).[465]

The National Police Board is headed by the National Police Commissioner, who is appointed by the government. It reports to the minister of justice.

Register Board

The national police service and Security Service are also subject to the jurisdiction of the Swedish Register Board (« *Registernämnden* »), which monitors compliance with the laws governing the collection, maintenance and disclosure of personal information by

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[462] *Defence Intelligence Activity Act* (2000:131); related ordinance (2000:131).

[463] International Helsinki Federation for Human Rights, "Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2004", chapter on Sweden, p. 3 (http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860), citing Swedish Helsinki Committee, *Annual Report 2003*.

[464] National Police Board, "Polisen: A presentation of the Swedish Police Service", pp. 4-5 (http://www.polisen.se/inter/mediacache//4347/4637/poliseng.pdf); and Swedish national police, "Who supervises the police?", www.polisen.se.

[465] Iain Cameron & Dennis Töllborg, "Internal Security in Sweden" in Jean-Paul Brodeu, Peter Gill & Dennis Töllborg, eds., *Democracy, Law and Security: Internal Security services in Contemporary Europe* (Aldershot: Ashgate, 2002), ch. 8.

government authorities.[466] For example, the Register Board ensures that the Security Service complies with laws regulating what personal information can be released to an employer following a security check which the Service has carried out. The Board also makes decisions on whether or not, or to what extent personal information contained in a Security Service file can be released to the individual concerned. The Board has full access to the files of all the public bodies within its jurisdiction, including Security Service files. The Register Board does not have a regular complaint-processing function.[467]

Members of the Register Board are appointed by the executive government for three-year terms. The Board submits an annual report to the executive government.[468]

Parliamentary Ombudsmen's Office

The Swedish police service, including the Secret Service, and Sweden's intelligence services[469] are also subject to the Office of the Parliamentary Ombudsmen (« *Riksdagens ombudsmän* »).[470] The Ombudsmen are individuals elected by the Riksdag for four-year terms.[471] Their mandate is to ensure that public authorities, including any individuals employed by the civil service or local governments or whose work otherwise involves the exercise of public authority, comply with law and "fulfill their obligations in all other respects".[472] Ombudsmen's inquiries are based on complaints from the general public, on cases initiated by the Ombudsmen, or on observations made during the course of

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[466] The mandate of the Register Board is set out in a government ordinance (1994 : 633). Its enforcement jurisdiction includes the *Security Protection Act 1996* (1996:627) and the *Police Data Act 1998* (1998: 622).

[467] (1994: 633).

[468] (1994: 633).

[469] The *Act with Instructions for the Parliamentary Ombudsmen* (1986:765), art. 2, (http://www.jo.se/Page.asp?MenuId=37&MainMenuId=12&ObjectClass=DynamX_Document&Id=575). See also the summary in English at the end of the Parliamentary Ombudsmen's Report for the period 1 July 2000 to 30 June 2001 (http://www.riksdagen.se/debatt/0001/forslag/jo1/jo1.pdf). Note that jurisdiction over "the armed forces…extends only to commissioned officers with the rank of second lieutenant or above, and to those of corresponding rank" (*Act with Instructions for the Parliamentary Ombudsmen* (1986:765), art. 2.

[470] National Police Board, "Polisen: A presentation of the Swedish Police Service", p. 5 (http://www.polisen.se/inter/mediacache//4347/4637/poliseng.pdf).

[471] *Riksdag Act*, ch. 8, art. 11 (http://www.jo.se/Page.asp?MenuId=37&MainMenuId=12&ObjectClass=DynamX_Document&Id=573).

[472] Parliamentary Ombudsmen, "General Information", (http://www.jo.se/default.asp?SetLanguage=en).

inspections.[473] The Ombudsmen may choose to refer complaints to other authorities, if they are of the view that the complaint can be more appropriately investigated and appraised by that authority.[474] Ombudsmen have a variety of remedial powers. For example, they can offer "opinions" about whether an action by a public official was in compliance with the law[475], or otherwise erroneous or improper; they can offer "advisory statements"; they can act as special prosecutors and lay criminal charges against public officials[476]; and they can invoke disciplinary measures, such as salary deductions, suspensions and dismissals.[477]

The Ombudmen's Office submits annual reports to the parliamentary Committee on the Constitution, which then files its own written report and notifies the Riksdag.[478]

Committee on the Constitution

The police services and intelligence services in Sweden fall under the direction of the ministers of justice and defence, respectively. These ministers, as well as all other ministers, are subject to scrutiny by the Committee on the Constitution, which is a parliamentary committee that scrutinizes ministers' performance of their duties and the handling of government business.[479] Parliamentary control of the government and public authorities is in fact one of the "principal tasks" of the Riksdag, according to Sweden's constitution.[480]

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[473] Parliamentary Ombudsmen, "General Information", (http://www.jo.se/default.asp?SetLanguage=en).
[474] The *Act with Instructions for the Parliamentary Ombudsmen* (1986:765), art. 18, (http://www.jo.se/Page.asp?MenuId=37&MainMenuId=12&ObjectClass=DynamX_Document&Id=575),
[475] For example, in its 2000-2001 annual report, the Parliamentary Ombudsmen found that a police official had had "no basis in law" for the issuance of a warrant for a vehicle search. See Parliamentary Ombudsmen's Report for the period 1 July 2000 to 30 June 2001 (http://www.riksdagen.se/debatt/0001/forslag/jo1/jo1.pdf), pp. 546-47.
[476] According to the Ombudsmen's website, this power is rarely used. See http://www.jo.se/Page.asp?MenuId=23&Mainmenuld=12&ObjectClass=DynamX_Documents&SetLanguage=en.
[477] Parliamentary Ombudsmen, "Powers and Sanctions" (http://www.jo.se/Page.asp?MenuId=23&Mainmenuld=12&ObjectClass=DynamX_Documents&SetLanguage=en). See also *Act with Instructions for the Parliamentary Ombudsmen* (1986:765), arts. 3ff.
[478] Parliamentary Ombudsmen, "General Information", (http://www.jo.se/default.asp?SetLanguage=en).
[479] Swedish Parliament, « The Riksdag at Work : The Committee on the Constitution » (http://www.riksdagen.se/english/work/scrutint_committe.asp).
[480] Swedish Parliament, « The Riksdag at Work : Parliamentary Control » (http://www.riksdagen.se/english/work/scrutinies.asp). See also *Instrument of Government*, c. 12 (http://www.riksdagen.se/english/work/fundamental/government.asp).

The purpose of the Committee's scrutiny is "to ascertain whether the government and individual ministers have complied with current rules and established practice in their handling of government business" and to investigate "the suitability of measures taken or omitted in the conduct of government business." The Committee scrutinizes matters on its own initiative, but also, and more often, upon request by members of the Riksdag, individually or collectively. The Committee has access to all government documents, even if they are classified. It can cause government to provide an account of its handling of government business, and it can summon ministers and officials to respond to questions concerning the work of government. Committee hearings may be held in public.[481]

Results of Committee investigations are submitted to the Riksdag one or twice a year in special reports, in which the Committee states its view of the conduct of the government and individual ministers in the various matters which have been scrutinized. The Committee cannot formally reprimand ministers, but if it finds that a ministers has committed a "gross dereliction of duty", it can institute criminal proceedings in the Supreme Court. The Committee's report could also in theory lead to a declaration of no confidence in the Riksdag.[482]

National Audit Office

The Swedish National Audit Office (*Riksrevisionen*)("SNAO") performs audits of "the complete activity of the state",[483] including the activities of the law enforcement and intelligence bodies. The SNAO recently replaced two previously-existing structures, the Office of the Parliamentary Auditors and the National Audit Office.[484] The SNAO's

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[481] All information in this paragraph cited to Swedish Parliament, « The Riksdag at Work : The Committee on the Constitution » (http://www.riksdagen.se/english/work/scrutint_committe.asp).
[482] All information in this paragraph cited to Swedish Parliament, « The Riksdag at Work : The Committee on the Constitution » (http://www.riksdagen.se/english/work/scrutint_committe.asp).
[483] Swedish National Audit Office (http://www.riksrevisionen.se/templates/Page.aspx?id=2128).
[484] Swedish National Audit Office (http://www.riksrevisionen.se/templates/Page.aspx?id=2128).

audits are aimed at the promoting quality, efficiency and economical use of public resources.[485]

Audit responsibility is divided among three Auditors General, who decide what activities will be audited, how the audits will be carried out, and what "conclusions" should be drawn.[486]

Office of the Chancellor of Justice

Sweden's law enforcement and intelligence bodies are also subject to the Office of the Chancellor of Justice. This is a section within the government's prosecution service, which, in addition to its prosecution role in certain kinds of cases, "supervises government agencies and their officials in order to monitor compliance with laws and other statutes." The Office of the Chancellor of Justice accepts and processes public complaints, and files reports with the executive government.[487]

VII. UNITED KINGDOM

a. Introduction

The law enforcement and security intelligence landscape in the United Kingdom (UK) has undergone considerable change in recent years. A number of statutes have been enacted, including the *Terrorism Act 2000*[488], which created new terrorism offences and gave police enhanced powers to investigate terrorism; and the *Anti-Terrorism, Crime and Security Act 2001*[489], which also set out certain enhanced powers and security measures. Many intelligence-collection activities have been placed under statutory regulation[490];

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[485] Swedish National Audit Office (http://www.riksrevisionen.se/templates/Page.aspx?id=2128). See also National Police Board, "Polisen: A presentation of the Swedish Police Service", p. 5. See http://www.polisen.se/inter/mediacache//4347/4637/poliseng.pdf.

[486] Swedish National Audit Office (http://www.riksrevisionen.se/templates/Page.aspx?id=2128).

[487] Swedish government, "Public prosecution service" (http://www.sweden.gov.se/sb/d/2708/a/15130/m/wai). See also National Police Board, "Polisen: A presentation of the Swedish Police Service", p. 5 (http://www.polisen.se/inter/mediacache//4347/4637/poliseng.pdf).

[488] *Terrorism Act* (U.K.), 2000, c. 11.

[489] *Anti-Terrorism, Crime and Security Act* (U.K.), 2000, c. 24.

[490] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23.

many police structures have been reformed[491]; and a new review body for the police has been established for England and Wales.[492] The government has also increased its national security funding, including its allotment to law enforcement and intelligence agencies engaged in counter-terrorism activities.[493] The UK government is also monitoring the operation of certain of its counter-terrorism measures, by way of "independent review"[494], and promoting public discussion about the proper balances between national security and rights and freedoms.[495]

This section of the paper provides an overview of the law enforcement and intelligence structures in place in the UK, as well as their review and accountability mechanisms.[496] Notable features of the UK landscape include: the national security activities of the Special Branch, a part of the UK police forces; and the fact that many of the investigative methods of the police forces (including interception of communications, surveillance and the use of human intelligence) are subject to review by the same authorities as those of the UK's three civilian intelligence agencies.

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[491] *Police Reform Act* (U.K.), 2002, c. 30. See also the website of the Secretary of State for the Home Department (the "Home Office"): http://www.homeoffice.gov.uk.

[492] The *Police Reform Act* (U.K.), 2002, c. 30 created the Independent Police Complaints Commission for England and Wales. See also http://www.ipcc.gov.uk/.

[493] See UK, Secretary of State for the Home Department, "Counter-Terrorism & Resilience: Key Facts", September 2004 (http://www.homeoffice.gov.uk/docs3/terrorism_keyfacts.pdf).

[494] See for example, Lord Carlile of Berriview Q.C. (Independent Reviewer of the *Terrorism Act 2000*), "Report on the Operation in 2002 and 2003 of the Terrorism Act 2000), (http://www.homeoffice.gov.uk/docs3/terrorism_act_operation.pdf); "Anti-Terrorism, Crime and Security Act 2001, Part IV, Section 28, Review 2003" (http://www.homeoffice.gov.uk/docs3/atcsa_review_part7.pdf). For a listing of "Independent Reviews of Terrorism Legislation", see http://www.homeoffice.gov.uk/terrorism/reports/independentreviews.html.

[495] See for example Secretary of State for the Home Department, "Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper", presented to the UK Parliament, February 2004 (http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf).

[496] Since the UK has four constituent parts (England, Wales, Scotland and Northern Ireland), with variously devolved powers, this chapter makes separate reference in some cases to structures which exist in only one or several parts of the UK. This chapter does not present an exhaustive description of the structures in place in all of England, Wales, Scotland and Northern Ireland.

b. Law Enforcement and Intelligence

The United Kingdom does not have a national police force for general law enforcement.[497] Policing is generally carried out by local police forces in England, Wales, Scotland and Northern Ireland.[498]

The mandate of these local forces therefore includes national security law enforcement, though the scope and structure of their national security activities varies, depending on their local circumstance.[499] The Metropolitan Police Service, which polices the greater London area, plays the leading role in counter-terrorism investigation by UK police: the Commander of the Metropolitan's Anti-Terrorist Branch is the national coordinator for the investigation of acts of terrorism; and the Branch investigates acts of terrorism both within its defined policing area, and, in conjunction with local forces, throughout the UK.[500]

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[497] The UK does, however, have certain national forces with specific mandates. For example, the National Crime Squad (NCS) and the National Criminal Intelligence Service (NCIS) focus on law enforcement and intelligence collection, respectively, in the area of organised crime. See *Police Act* (U.K.), 1997, c. 50. See also http://www.nationalcrimesquad.police.uk/ and http://www.ncis.co.uk/. The UK government intends to merge the NCS and the NCIS, together with certain governmental investigative and intelligence sections, in 2006. The new agency will be called the Serious Organised Crime Agency (SOCA). See UK, Secretary of State for the Home Department, "One Step Ahead: A 21st Century Strategy to Defeat Organised Crime" (Crown: March, 2004), also known as the "Organised Crime White Paper". Available at http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf.

Other examples include the British Transport Police, the UK Atomic Energy Authority Constabulary, and the Royal Parks Constabulary.

[498] For a list of UK local police forces, non-geographic police forces, and related agencies and links, see http://www.police.uk/.

[499] See the Policing Plans and other publications of the various forces, which can be accessed via the http://www.police.uk/ portal.

[500] See the Metropolitan Police Service's website, Anti-Terrorist Branch: http://www.met.police.uk/terrorism/index.htm . The Metropolitan also appears to receive the bulk of the government's funding to police for counter-terrorism. See for example Secretary of State for the Home Department ("Home Office") press releases, "Government Steps up its Fight Against Terrorism…", dated March 19, 2004 (http://www.homeoffice.gov.uk/n_story.asp?item_id=55), and "Budget Boost to Regions for Street Crime, Counter-terrorism…", dated May 1, 2002 (http://www.homeoffice.gov.uk/n_story.asp?item_id=55). See also a speech by Home Office representative Leigh Lewis to the Police ederation Annual Conference, May 20, 2004 (http://www.homeoffice.gov.uk/docs3/speech_policefed.html).

The Metropolitan Police Service includes a section – comprised of several hundred members – known as the Special Branch.[501] Other police forces in the UK also have their own respective Special Branches.[502] According to March 2004 Guidelines issued by the Home Office, the "primary function" of Special Branch is "covert intelligence work in relation to national security".[503] The Special Branch is also "available" to local police forces to deploy on duties which include "the prevention and detection of crime and the ensuring of public safety", but the Special Branch "should not be diverted" from its primary function "unless absolutely necessary".[504] "Counter-terrorist work is the main focus of their activity."[505] The Special Branch "assists" and "supports" the intelligence-collection efforts of the UK's security intelligence agencies, in particular the Security Service (described below) with which it often works in "close co-operation".[506] The Special Branch is staffed by police officers and by civilians.[507]

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[501] Her Majesty's Inspector of Constabulary, "A Need to Know: HMIC Thematic Inspection of Special Branch and Ports Policing" (Home Office Communications Directorate: January, 2003), p. 10.

[502] Home Office, Scottish Executive and Northern Ireland Office, "Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), p. 6.

[503] Home Office, Scottish Executive and Northern Ireland Office, "Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), p. 2. This statement of the Special Branch's function appears to differ from the statement set out in the 1994 Guidelines, which provided that the role of Special Branch was "to gather intelligence to meet national security requirements as well as to support other policing priorities such as the prevention of disorder." See Her Majesty's Inspector of Constabulary, "A Need to Know: HMIC Thematic Inspection of Special Branch and Ports Policing" (Home Office Communications Directorate: January, 2003), p. 10. It may be relevant that in this report, the HMIC found that "the role and responsibilities of Special Branch are unclear; the 1994 Guidelines do not reflect the changed environment....HMIC recommends that the Home Office review and update the current Guidelines in order to clarify the role of Special Branch thereby formalising its remit and priorities within the national security arena" (at p. 13). More research will be required on the precise nature of the activities of the Special Branch.

[504] Home Office, Scottish Executive and Northern Ireland Office, "Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), p. 2. See also the discussion *ibid.*

[505] Home Office, Scottish Executive and Northern Ireland Office, "Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), Foreword.

[506] Home Office, Scottish Executive and Northern Ireland Office, "Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), p. 6 and Foreword. We are conducting further research to determine the scope of the Special Branch's activities, including its assistance to and cooperation with the UK's security intelligence agencies.

[507] Home Office, Scottish Executive and Northern Ireland Office, "Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), Foreword.

Security intelligence in the UK is otherwise carried out by three civilian intelligence agencies: the Security Service; the Secret Intelligence Service; and the Government Communications Headquarters. The Defence Intelligence Staff, which is a part of the Ministry of Defence, is also a contributor of security intelligence.

The Security Service[508], also known as MI-5, is responsible for domestic security intelligence. According to its governing statutes, the Security Service's functions are: "the protection of national security, and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means"; the safeguarding of "the economic well-being" of the UK; and "support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime."[509] MI-5's principal means of gathering intelligence are covert human intelligence sources, directed surveillance, interception of communications, and intrusive surveillance.[510] The Director-General of MI-5 must ensure that "there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of preventing or detecting serious crime."[511]

The Secret Intelligence Service (SIS)[512], also known as MI-6, is responsible for foreign intelligence. Specifically, its functions are to "obtain and provide information relating to the actions or intentions of persons outside the British Islands; and to perform other tasks relating to the actions or intentions of such persons", but only "in the interests of national security, with particular reference to the defence and foreign policies of (the

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[508] See the *Security Service Act* (U.K.), 1989, c. 5; http://www.mi5.gov.uk/; and UK, "National Intelligence Machinery" (Crown: September, 2001) (http://www.archive.official-documents.co.uk/document/caboff/nim/0114301808.pdf).
[509] *Security Service Act* (U.K.), 1989, c. 5, s. 1; *Security Service Act* (U.K.), 1996, c. 35, s. 1.
[510] http://www.mi5.gov.uk/output/Page77.html.
[511] *Security Service Act* (U.K.), 1989, c. 5, s. 2.
[512] See the *Intelligence Services Act* (U.K.), 1994, c. 13; http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1059736061019; and UK, "National Intelligence Machinery" (Crown: September, 2001) (http://www.archive.official-documents.co.uk/document/caboff/nim/0114301808.pdf).

government); in the interests of the economic well-being of the UK; or in support of the prevention or detection of serious crime."[513] The Chief of the SIS must ensure "that there are arrangements for securing that no information is obtained by the SIS except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary (i) for that purpose; (ii) in the interests of national security; (iii) for the purpose of the prevention or detection of serious crime; or (iv) for the purpose of any criminal proceedings."[514]

The Government Communications Headquarters (GCHQ)[515] carries out signals intelligence, in the same interests as the SIS, i.e. national security, national economic well-being, and prevention or detection of serious crime.[516] The Director of the GCHQ must ensure "that there are arrangements for securing that no information is obtained by the GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose or for the purpose of any criminal proceedings."[517]

The Defence Intelligence Staff collect and analyse intelligence generally in support of the Ministry of Defence, military commands and deployed armed forces.[518]

c. Review, Oversight and Accountability

Police

The UK's police forces, including the Special Branch, fall under the responsibility of the Secretary of State for the Home Department (the "Home Secretary" and the "Home Office")[519], who is a member of the Cabinet. The Home Secretary must "exercise his

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[513] *Intelligence Services Act* (U.K.), 1994, c. 13, s. 1.
[514] *Intelligence Services Act* (U.K.), 1994, c. 13, s. 2.
[515] See the *Intelligence Services Act* (U.K.), 1994, c. 13; http://www.gchq.gov.uk/; and UK, "National Intelligence Machinery" (Crown: September, 2001) (http://www.archive.official-documents.co.uk/document/caboff/nim/0114301808.pdf).
[516] *Intelligence Services Act* (U.K.), 1994, c. 13, s. 3.
[517] *Intelligence Services Act* (U.K.), 1994, c. 13, s. 4.
[518] UK, "National Intelligence Machinery" (Crown: September, 2001) (http://www.archive.official-documents.co.uk/document/caboff/nim/0114301808.pdf).
[519] *Police Act* (U.K.), 1996, c. 16; *Police Act* (U.K.), 1997, c. 50; *Police Reform Act* (U.K.), 2002, c. 30; http://www.homeoffice.gov.uk.

powers....to...best...promote the efficiency and effectiveness of the police".[520] The Home Secretary's powers and responsibilities include the laying before Parliament of a National Policing Plan[521], the power to issue codes of practice[522], and the power to call for a "local inquiry" into any matter.[523] The Home Office also routinely issues "Circulars" to the police, which often include "guidance" on the application of certain legislative provisions.[524]

The UK's police forces are also each subject to a "Police Authority"[525], which is charged with maintaining "efficient and effective" police forces for its respective policing area.[526] Chief constables of the police forces file annual reports with their respective Police Authorities[527], who in turn file annual reports with the Home Secretary.[528] The Home Secretary may also call for special reports.[529]

The efficiency and effectiveness of the police forces is also overseen by Her Majesty's Inspectors of Constabulary ("Inspectors" or "HMIC").[530] Inspectors are appointed by, and report to the Home Secretary.[531] The HMIC provides annual, but also special, or thematic, reports to the Home Secretary.[532] For example, the HMIC recently prepared a

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[520] *Police Act* (U.K.), 1996, c. 16, s. 36.
[521] *Police Act* (U.K.), 1996, c. 16, s. 36A (added by *Police Reform Act* (U.K.), 2002, c. 30, s. 1). For an example of a national policing plan, see Home Office, The National Policing Plan 2004-2007, available at: http://www.policereform.gov.uk/docs/national_policing_plan/natpolplan2004_7.pdf.
[522] *Police Act* (U.K.), 1996, c. 16, s. 39.
[523] *Police Act* (U.K.), 1996, c. 16, s. 49.
[524] See for example Home Office Circular 42/2003 (http://www.homeoffice.gov.uk/docs2/hoc4203.html). For other examples, see http://www.homeoffice.gov.uk/terrorism/reports/legisguidance.html.
[525] The NCIS and NCS are subject to a "Service Authority". See *Police Act* (U.K.), 1997, c. 50, ss. 1, 47. In Northern Ireland, the Northern Ireland Policing Board carries out functions similar to the Police Authorities. See *Police (Northern Ireland) Act* (U.K.), 2000, c. 32, ss. 2ff.
[526] *Police Act* (U.K.), 1996, c. 16, ss. 3-9, s. 26.
[527] *Police Act* (U.K.), 1996, c. 16, s. 22.
[528] *Police Act* (U.K.), 1996, c. 16, s. 9.
[529] *Police Act* (U.K.), 1996, c. 16, ss. 43-44.
[530] *Police Act* (U.K.), 1996, c. 16, s. 54. See also the HMIC homepage: http://www.homeoffice.gov.uk/hmic/hmic.htm.
[531] *Ibid.*
[532] For examples, see http://www.homeoffice.gov.uk/hmic/pubs.htm and http://www.scotland.gov.uk/library2/doc05/cicr-03.htm.

report on its inspection of the UK Special Branch and Ports Policing[533], which led to the issuance by the government of new Guidelines for the Special Branch[534]. The HMIC's reports are laid before Parliament by the Home Secretary. They are public, except that the Home Secretary can refuse publication of any part that he/she determines would be against the interests of national security, or might jeopardize the safety of any person.[535]

The local police forces in England and Wales are also subject to the Independent Complaints Police Commission (IPCC), which recently replaced the Police Complaints Authority.[536] The IPCC's members cannot be police officers or former officers[537], but complaints against the police can still be filed with, referred to, and/or investigated by the police, or Police Authority. The IPCC, however, retains the right to supervise or manage an investigation, or to conduct it itself; and the right to "record a matter" for investigation in certain circumstances.[538] Complainants may also appeal the results of an investigation to the IPCC.[539]

Complaints can be made by persons affected by the impugned police conduct, by witnesses, or by representatives of such individuals.[540] Police authorities and forces must turn over documents to the IPCC, except that that need only do so at "the earliest time at which it is practicable", and they may decline to do so "at all in a case in which it never becomes practicable".[541] The IPCC does not have the power to make binding conclusions; only recommendations as to the appropriate discipline or other action that should be taken.[542]

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[533] HMIC, "A Need to Know: HMIC Thematic Inspection of Special Branch and Ports Policing" (Home Office Communications Directorate: January, 2003) (http://www.homeoffice.gov.uk/hmic/a_need_to_know.pdf).
[534] Home Office, Scottish Executive and Northern Ireland Office, " Guidelines on Special Branch in the United Kingdom" (Home Office, Communications Directorate: March, 2004) (http://www.scotland.gov.uk/library5/justice/sbwuk.pdf), p. 2.
[535] *Police Act* (U.K.), 1996, c. 16, ss. 54-55.
[536] *Police Reform Act* (U.K.), 2002, c. 30, ss. 9ff. See also http://www.ipcc.gov.uk.
[537] *Police Reform Act* (U.K.), 2002, c. 30, s. 9.
[538] *Police Reform Act* (U.K.), 2002, c. 30, s. 10; Schedule 3, Parts 2, 3.
[539] *Police Reform Act* (U.K.), 2002, c. 30, Schedule 3, s. 25.
[540] *Police Reform Act* (U.K.), 2002, c. 30, s. 12.
[541] *Police Reform Act* (U.K.), 2002, c. 30, s. 17.
[542] *Police Reform Act* (U.K.), 2002, c. 30, Schedule 3, Part 3; s. 10.

The IPCC files annual reports with the Home Secretary, as well as reports containing advice and recommendations, and such other reports as the IPCC considers appropriate regarding matters which it believes "should be drawn to (the Home Secretary's) attention by reason of their gravity or of other exceptional circumstances."[543] Annual reports are laid before Parliament, and other reports are laid before Parliament if the Home Secretary "considers it appropriate to do so".[544]

In Scotland, complaints against the police are handled by the police themselves, though a complainant who is dissatisfied with the results of an investigation can write to Her Majesty's Inspectorate of Constabulary for Scotland, who review the investigation and may request a reconsideration.[545] In addition, the government recently announced the establishment of a multi-agency review of complaints procedures in order to inform the government's plans to establish "an independent complaints body".[546]

In Northern Ireland, the office of Police Ombudsman for Northern Ireland was created by statute in 1998.[547] It has jurisdiction over police forces in Northern Ireland. Complaints are made to the Ombudsman, who decides whether the complaint merits informal resolution, formal investigation, and/or investigation by the chief constable of the relevant police force.[548] Any member of the public may make a complaint.[549] Matters may also be referred to the Ombudsman by the responsible minister, by the Northern Ireland Policing Board (the equivalent of the Police Authorities found in England and Wales), or by the chief constable of the police, if any of these authorities believe it is in the public interest to do so.[550] Similarly, the Ombudsman may "of her/his own motion" investigate certain matters.[551] In conducting its investigations, the office of the

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[543] *Police Reform Act* (U.K.), 2002, c. 30, s. 11.
[544] *Police Reform Act* (U.K.), 2002, c. 30, s. 11.
[545] Her Majesty's Inspectorate of Constabulary for Scotland, "The Role of HMIC in Police Complaints" (http://www.scotland.gov.uk/Topics/Justice/Police/15403/2065).
[546] Scottish Executive, News Release, "Next Steps on Police Complaints", dated June 24, 2004 (http://www.scotland.gov.uk/News/Releases/2004/06/5702).
[547] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32. See also http://www.policeombudsman.org/.
[548] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, ss. 53-54.
[549] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 52.
[550] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 55.
[551] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 55.

Ombudsman has all the powers of a police officer, and may also, if the responsible minister so orders, have certain investigatory powers of the police[552] at its disposal.[553]

If the Ombudsman refers a complaint to the police for investigation, she/he may supervise such investigation, and approve the person charged with carrying it out.[554] Whether the investigation is carried out by the police or by the Ombudsman's office, the Ombudsman then makes a recommendation as to whether or not disciplinary proceedings should be brought, and may direct the police force to do so.[555] The Ombudsman may also make a determination as to whether a criminal offence may have been committed, in which case, mediation and/or referral to the Director of Public Prosecutions may ensue.[556]

The Ombudsman submits annual and special reports to the minister, who lays such reports before both Houses of Parliament.[557]

Police forces in the United Kingdom are also subject to a further form of accountability, one to which the intelligence agencies are also subject: the *Regulation of Investigatory Powers Act* (RIPA).[558] For example, where police wish to intercept communications, they must seek warrants from the Home Secretary.[559] Only the heads of certain police forces, including the Metropolitan Police Service, can request interception warrants.[560] The Act sets out a number of conditions regarding the issuance of warrants, including the grounds upon which the Home Secretary may issue them.[561] These include national security.[562] There are also restrictions set out on the use of intercepted material.[563]

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[552] *Police and Criminal Evidence (Northern Ireland) Order* (U.K.), 1989.
[553] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 56.
[554] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 57.
[555] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 59.
[556] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 58. (See also *Police (Northern Ireland) Act* (U.K.), 2000, c. 32, s. 62).
[557] *Police (Northern Ireland) Act* (U.K.), 1998, c. 32, s. 61.
[558] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23. See also the *Regulation of Investigatory Powers (Scotland) Act* (U.K.), 2000, asp. 11, which will not be discussed in this paper.
[559] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 7. A "senior official" may also issue a warrant in certain circumstances.
[560] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 6.
[561] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 5-11.
[562] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 5.
[563] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 15, 19.

The RIPA also requires that police forces seek authorisation from "designated individuals" within the respective forces to otherwise acquire and/or disclose "communications data"[564], and to use surveillance and covert human intelligence.[565] One or more grounds, including national security, must be satisfied in order to receive authorisation.[566]

Police forces must also request authorisation for "intrusive surveillance". Such requests are made to a "senior authorising officer" of the requesting force[567], and then must be further approved by an "ordinary" Surveillance Commissioner.[568] Decisions made by an "ordinary" Surveillance Commissioner can be appealed to the Chief Surveillance Commissioner.[569]

All such investigative and authorisation activities are variously subject to scrutiny by either the Interception of Communications Commissioner (ICC)[570] or the "ordinary" and Chief Surveillance Commissioners[571], all of whom are appointed by the Prime Minister.[572] Police forces are obliged to provide requested documentation to the ICC and the Surveillance Commissioners.[573] The Chief Surveillance Commissioner and ICC make reports to the Prime Minister, who in turn lays the reports before Parliament, with the exception of any information which the Prime Minister, in consultation with the ICC or Chief Commissioner respectively, deems "prejudicial" to national security or other defined interests.[574]

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[564] See definition at *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 21.
[565] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 26ff.
[566] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 22, 28-29.
[567] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 32.
[568] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 36.
[569] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 38.
[570] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 57ff.
[571] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 36-40, ss. 62ff. See also *Police Act* (U.K.), 1997, c. 50, ss. 91ff. Note that the *Act* also provides for an Investigatory Powers Commissioner for Nothern Ireland. See s. 61.
[572] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 57; *Police Act* (U.K.), 1997, c. 50, s. 91.
[573] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 40, 58.
[574] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 58, 39; *Police Act* (U.K.), 1997, c. 50, s. 107.

The ICC and Surveillance Commissioners also assist the Investigatory Powers Tribunal, which addresses public complaints.[575] The Tribunal has the power to compel documents and "information", and may conduct proceedings in relation to complaints.[576] It has the power to make "any such award of compensation or other order as (it) thinks fit", including the quashing of warrants or authorizations, and the destruction of records.[577] Appeals from orders of the Tribunal are available in certain circumstances.[578] The Tribunal makes reports to the Prime Minister of any findings "in favour of" a complainant and any determinations relating to "any act or omission" or authorisation by the responsible Minister.[579]

Finally, to the extent that the investigative activities of the police lead to and become part of criminal prosecutions, they are subject to review by UK courts.

Intelligence agencies

The function and operations of the UK's intelligence agencies, as well as the roles of the responsible ministers are generally prescribed by statute: MI-5 is governed by the *Security Service Act*[580]; and MI-6 and the GCHQ are governed by the *Intelligence Services Act*.[581] The GCHQ and SIS are under the ministerial responsibility of the Secretary of State for Foreign and Commonwealth Affairs, and the Security Service is under the responsibility of the Home Secretary.[582] The functions of these ministers include appointments of the chiefs of the respective agencies and the issuance of warrants.[583]

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[575] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 65ff.
[576] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 68.
[577] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 67.
[578] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 67.
[579] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, s. 68.
[580] *Security Service Act* (U.K.), 1989, c. 5; *Security Service Act* (U.K.), 1996, c. 35.
[581] *Intelligence Services Act* (U.K.), 1994, c. 13.
[582] UK, "National Intelligence Machinery" (Crown: September, 2001) (http://www.archive.official-documents.co.uk/document/caboff/nim/0114301808.pdf), pp. 6-10.
[583] *Security Service Act* (U.K.), 1989, c. 5; *Security Service Act* (U.K.), 1996, c. 35; *Intelligence Services Act* (U.K.), 1994, c. 13; *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23.

The activities of these agencies are also subject to regulation by the RIPA, with some differences from the regulation of the activities of police forces. For example, an authorisation for intrusive surveillance does not require further approval by the Surveillance Commissioner.[584]

The Interception of Communications Commissioner conducts reviews of authorisations and warrants, as it does with the police forces[585]; but intelligence agencies are also subject to scrutiny by an Intelligence Services Commissioner (ISC), who reviews the performance of the responsible Minister in relation to the "activities of the intelligence services", including his/her issuance of warrants pursuant to the *Intelligence Services Act*. As with the ICC, the intelligence agencies have an obligation to provide requested documentation to the ISC. The ISC also reports to the Prime Minister, who lays the reports before Parliament, subject to exclusions on grounds similar to the reports of the ICC.[586]

The ICC and ISC assist the Investigatory Powers Tribunal, which is described above and which addresses public complaints relating not only to the activities of police forces, but also those of the UK's intelligence services.[587]

The Security Service, the SIS and the GCHQ are also subject to parliamentary scrutiny. The Intelligence and Security Committee is provided for by statute,[588] and draws its membership from both Houses of Parliament, with the exception that none of the members of the Committee may be members of Cabinet. The Intelligence and Security Committee examines the "expenditure, administration and policy" of the three intelligence agencies. It files an annual report with the Prime Minister, which is then laid before Parliament. However, the Prime Minister, in consultation with the Committee, may decide that the publication of certain matters would be "prejudicial to the continued discharge of the functions" of any of the three intelligence agencies, and may exclude

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[584] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 36, 41, 42.
[585] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 57-58.
[586] All references in this paragraph to *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 59-60.
[587] *Regulation of Investigatory Powers Act* (U.K.), 2000, c. 23, ss. 65ff.
[588] *Intelligence Services Act* (U.K.), 1994, c. 13, s. 10.

that matter from the copy of the report laid before Parliament.[589] The Committee also provides "ad hoc" reports to the Prime Minister from time to time.[590]

VIII. UNITED STATES

a. Introduction

There are a number of agencies in the United States that are involved in national security. The main ones are: the Central Intelligence Agency (CIA),[591] which is responsible for gathering foreign intelligence; the Federal Bureau of Investigation (FBI),[592] which handles domestic security; and the military, which has its own intelligence apparatus, as well as responsibility for the National Signals Agency (NSA),[593] which intercepts electronic and other signals in the ether.

This spaper will concentrate on the FBI, which is responsible for regular policing for matters within federal jurisdiction as well as domestic security matters.[594] There is no non law-enforcement agency in the United States, like CSIS in Canada or MI5 in the UK, that is primarily responsible for domestic intelligence involving national security. There had been a growing number of recommendations that such an agency be established,[595] but the recent *9/11 Commission Report* recommended against it.[596] The FBI combines the functions of CSIS and the RCMP. A brief analysis of review mechanisms over the CIA and the NSA will follow the discussion of the FBI.

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[589] All references in this paragraph to *Intelligence Services Act* (U.K.), 1994, c. 13, s. 10. See also
[590] UK, "National Intelligence Machinery" (Crown: September, 2001) (http://www.archive.official-documents.co.uk/document/caboff/nim/0114301808.pdf), p. 23.
[591] *National Security Act of 1947*, 50 U.S.C. §403-1.
[592] *Executive Order 12333 – United States Intelligence Activities*, Part 1.14 (1981).
[593] *National Security Act of 1947*, 50 U.S.C. §403-5.
[594] U.S., National Commission on Terrorist Attacks upon the United States, *Staff Statement No. 9: Law Enforcement, Counterterrorism, and Intelligence Collection in the United States Prior to 9/11* (April 13, 2004) at 1.
[595] See U.S., Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, *Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence* (S. Rep. No. 107-351; H.R. Rep. No. 107-792) (December 2002) at 8; U.S., Congressional Research Service, *FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress* (RL 32336) (The Library of Congress, April 6, 2004) at 37-43; U.S., Congressional Research Service, *Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States* (RL 31920) (The Library of Congress, May 19, 2003).
[596] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (New York: W.W. Norton & Co., 2004) at 423-424.

A discussion of the many executive committees that provide oversight of intelligence and counterterrorism will not be undertaken here. At present, the principal ones include the National Security Council (NSC),[597] the President's Foreign Intelligence Advisory Board (PFIAB),[598] the President's Intelligence Oversight Board (PIOB),[599] and other bodies such as the Counterterrorism Security Group (CSG)[600] and the Homeland Security Council.[601] Their interaction with other bodies is complex. The PIOB, for example, is given the responsibility for reviewing the practices and procedures of the various Inspectors General within the intelligence community, described in later sections.[602] This paper will also not discuss the many internal committees within each agency, except the Office of Professional Responsibility for the FBI, discussed below.

In the twenty-five year period before 9/11, the focus of the review bodies was to bring the activities of the various security and intelligence agencies under greater control. After that date, the many reports and investigations by various review bodies primarily focus on failures of intelligence.[603] The most recent examples are the report of the Senate's Select Committee on Intelligence, *Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq*, released July 7, 2004[604] and the *9/11 Commission Report* prepared by the National Commission on Terrorist Attacks on the United States.[605] One of the Senate Select Committee report's main conclusions, for example, states: 'Most of the major key judgments in the Intelligence Community's October 2002 National Intelligence Estimate, *Iraq's Continuing Programs for Weapons of Mass Destruction*, either overstated, or were not supported by, the underlying intelligence

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[597] *National Security Act of 1947*, 50 U.S.C. §402.
[598] *Executive Order 12863 – President's Foreign Intelligence Advisory Board*, Part I (1993).
[599] *Executive Order 12863 – President's Foreign Intelligence Advisory Board*, Part II (1993).
[600] Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* (New York: Free Press, 2004) at 1.
[601] *Executive Order 13228 – Establishing the Office of Homeland Security and the Homeland Security Council*, §5 (2001). See Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington, D.C.: CQ Press, 2003) at 154.
[602] *Executive Order 12863 – President's Foreign Intelligence Advisory Board*, §2.2(d) (1993).
[603] See, e.g., Joint Senate/House Report 2001.
[604] U.S. Select Committee on Intelligence, *Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq*, July 7, 2004. online: http://intelligence.senate.gov/iraqreport2.pdf
[605] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (New York: W.W. Norton & Co., 2004).

reporting. A series of failures, particularly in analytic trade craft, led to the mischaracterization of the intelligence.'[606] Similarly, *The 9/11 Commission Report* states: 'the FBI did not have an effective intelligence collection effort. Collection of intelligence from human sources was limited, and agents were inadequately trained.'[607]

b. Federal Bureau of Investigation

The FBI was founded by the federal government in 1908 with 34 investigators. It now has over 27,000 employees.[608] In the 1970s, the FBI, like other intelligence bodies in the United States and Canada, was subject to close scrutiny. The Watergate affair that resulted in President Nixon's resignation had shown improper use of the FBI and the CIA by the White House.[609] Both the Senate[610] and the House[611] conducted investigations of the FBI and other intelligence-gathering agencies in the mid 1970s. As in Canada, many questionable activities were revealed. For many years, the FBI had conducted large scale, surreptitious surveillance of individuals, including civil rights leaders and student and black activists.[612] There was a strong climate for establishing mechanisms to control government agencies and departments.

Two major changes resulted. One was greater Congressional oversight of the intelligence gathering agencies. Both the Church and the Pike committees had criticized Congress' level of oversight.[613] The House and Senate Judiciary Committees continued to oversee

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[606] *Ibid.* at 14.
[607] *The 9/11 Commission Report* at 77.
[608] "FBI History", online: Federal Bureau of Investigation, http://www.fbi.gov/fbihistory.htm.
[609] Athan G. Theoharis, ed., *The FBI: A Comprehensive Reference Guide* (Phoenix: Oryx Press, 1999) at 128.
[610] U.S., Select Committee to Study Governmental Operations with respect to Intelligence Activities, *Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities* (S. Rep. No. 94-755) (Washington D.C.: U.S. Government Printing Office, 1976). The Church Committee was established in January 1975 to "conduct an investigation and study of governmental operations with respect to intelligence activities and the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government." See M.L. Friedland, *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980), a study prepared for the McDonald Commission on the RCMP; M.L. Friedland, "National Security: Some Canadian Legal Perspectives," (1980), 10 *Israel Yearbook on Human Rights* 257.
[611] U.S., House Select Committee on Intelligence. *Recommendations of the Final Report of the House Select Committee on Intelligence* (H. R. Rep. No. 94-833) (Washington, D.C.: U.S. Government Printing Office, 1976).
[612] Theoharis, *The FBI* at 126-127.
[613] *Ibid.* at 196.

the criminal and domestic security activities of the FBI, but two new permanent intelligence committees were established to monitor the counterintelligence activities of the FBI, such as uncovering espionage, as well as the foreign intelligence activities of the CIA.[614] Another change was the use of an Inspector General to oversee the activities of the FBI.

Inspector General for the Department of Justice, including the FBI

The *Inspector General Act* was passed by Congress in 1978. Inspectors General have been used in the United States from the beginning of the Republic. George Washington appointed the first Inspector General during the War of Independence in 1777 to superintend the training of the army in order to ensure troop proficiency in battle.[615] The Senate report accompanying the 1978 bill stated: 'Recent evidence makes it clear that fraud, abuse and waste in the operations of Federal departments and agencies and in federally-funded programs is reaching epidemic proportions.'[616] Under the 1978 *Act* the appointment is made by the President subject to confirmation by the Senate.[617] All statutory inspectors general are required to send semi-annual and special reports to Congress. These reports, in the words of one American expert on accountability, Bernard Rosen, constitute the 'bedrock of the inspector general's independence – that the semi-annual and special reports be sent by the agency head *without alteration* to the appropriate committees of Congress.'[618] To assist their investigations, the Inspectors have subpoena powers.[619]

Twelve agencies were made subject to the *Act*, but not originally the FBI or the Department of Justice, to which the FBI reports. It was not until 1988 that the

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[614] *Ibid.* at 196.
[615] Martin L. Friedland, *Controlling Misconduct in the Military: A study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Public Works and Government Services Canada, 1997) at 112; Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington D.C.: The Brookings Institution, 1993) at 25.
[616] As cited in Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington D.C.: The Brookings Institute, 1993) at 41.
[617] *Inspector General Act of 1978*, Pub. L. 95-452, §3(a), 92 Stat. 1101.
[618] Martin L. Friedland, *Controlling Misconduct in the Military: A Study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Public Works and Government Services Canada, 1997) at 114; Bernard Rosen, *Holding Government Bureaucracies Accountable* (Westport, Conn.: Praeger, 1998) at 157.
[619] Bernard Rosen, *Holding Government Bureaucracies Accountable* (Westport: Praeger, 1998) at 156.

Department of Justice was brought under the *Act*, and the Department of Justice's Inspector General was given authority over the FBI.[620] (The CIA acquired a statutory Inspector General the following year).[621] The Justice Department had been a strong critic of the bill on a number of grounds, including what Justice saw as congressional usurpation of executive functions.[622] The Department also argued that it already had an Office of Professional Responsibility within the Department, described below, which had been established in the mid 1970s to deal with improper conduct.[623] The 1988 legislation included a compromise that allowed both the Department of Justice and the FBI to keep their existing Offices of Professional Responsibility with authority to investigate misconduct involving their respective employees.[624]

The Office of Professional Responsibility for the Department of Justice was established in 1975 by Attorney General Edward Levi in response to criticisms about the excesses of the FBI. A year later, the FBI created its own Office of Professional Responsibility.[625] The FBI Office is similar to an internal affairs bureau in a Canadian police force. It is an internal discipline procedure, not an external independent review.

When the Inspector General for the Department of Justice was established, the Offices of Professional Responsibility in the Department and in the FBI continued. This created overlapping jurisdiction and inevitable conflicts and confusion.[626] This was resolved in the early 1990s with respect to investigative authority by giving jurisdiction for employee misconduct investigations to the Offices of Professional Responsibility.[627] In 1994, Attorney General Janet Reno expanded the jurisdiction of the Inspector to allow for

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[620] U.S., *Restoring Confidence in the FBI: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (June 20, 2001) at 2 (Michael R. Bromwich).
[621] Light, *Monitoring Government: Inspectors General and the Search for Accountability* at 26.
[622] *Ibid.* at 62-63.
[623] *Restoring Confidence in the FBI: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (June 20, 2001) at 1 (Michael R. Bromwich).
[624] U.S., *Restoring Confidence in the FBI: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (June 20, 2001) at 2 (Glenn A. Fine); Light, *Monitoring Government: Inspectors General and the Search for Accountability* at 129-130.
[625] John T. Elliff, *The Reform of FBI Intelligence Operations* (Princeton: Princeton University Press, 1979) at 160.
[626] U.S., *Restoring Confidence in the FBI: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (June 20, 2001) at 2 (Michael R. Bromwich).
[627] *Ibid.* at 2 (Michael R. Bromwich).

investigations of FBI personnel, but this required the consent of the Attorney General.[628] A former Inspector General of the Department, Michael Bromwich, who had served in that capacity from 1994 to 1999, testified before the Senate Judiciary Committee in June 2001 about the difficulty he had experienced. 'One factor in this early history,' he stated, 'that helps explain the failure to provide any investigative oversight over the FBI was the general hostility of the Department, including the FBI, towards the creation of the OIG (Office of the Inspector General) and the seeming desire to marginalize it.'[629] The Inspector's audit and program review authority over the FBI was virtually unlimited, but Bromwich stated: 'In practice, as I learned when I arrived, the FBI made life both difficult and unpleasant for OIG personnel engaged in work involving the FBI. Because doing work in the FBI was so time-consuming and frustrating, because there was a general lack of cooperation from FBI personnel, and because OIG personnel were more knowledgeable about other components of the Department than about the FBI, the OIG did fewer audits and less program evaluation work in the FBI than I would have liked.'[630]

The following month – in July 2001 – Attorney General John Ashcroft expanded the jurisdiction of the Department of Justice's Inspector General to provide that the Inspector had the right of first refusal to review all non-frivolous allegations of misconduct regarding FBI personnel.[631] This important change means that the Department of Justice Inspector General receives reports of all allegations of misconduct against FBI personnel[632] and chooses a small number of them to examine. For the two-year period ending July 2003 there were 1,657 misconduct complaints for the 27,000 personnel. Only 80 of them were chosen for investigation by the Inspector. Another 76 were referred to the Office of Professional Responsibility, with the requirement that the Inspector be kept

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[628] *Ibid.* at 3 (Michael R. Bromwich). Authorization could be given by either the Attorney General or the Deputy Attorney General.
[629] *Ibid.* at 2 (Michael R. Bromwich).
[630] *Ibid.* at 2 (Michael R. Bromwich).
[631] The authorizing legislation can be found at *21st Century Department of Justice Appropriations Authorization Act*, §308(1), 5 U.S.C. App. 3 §8E(b)(2) (2002). See Griffin B. Bell and Lee Colwell, *Study of the FBI's Office of Professional Responsibility* (February 2004) at 10-12. The Bell study recommended: that the Office of the Inspector General investigators receive better training; that the FBI Office of Professional Responsibility personnel rotate through the Department of Justice, Office of the Inspector General; and, that the Office of the Inspector General adopt procedural rights for employees under investigation. Griffin B. Bell and Lee Colwell, *Study of the FBI's Office of Professional Responsibility* at 51.
[632] Bell and Colwell, *Study of the FBI's Office of Professional Responsibility* at 15.

informed of the investigative results. For the rest, the Office of Professional Responsibility conducted the investigation without a continued reporting requirement to the Inspector.[633] Responsibility for imposing discipline in all cases rests outside the Office of the Inspector General, with bodies such as the Deputy Attorney General and the Office of Professional Responsibility.[634]

Investigations conducted by the Inspector General in recent years have included the failure of the FBI to uncover the espionage activities of former CIA officer Aldrich Ames[635] and FBI agent Robert Hannsen,[636] activities involving the FBI investigation into campaign financing,[637] allegations of distorted forensic conclusions from the FBI Laboratory,[638] the failure to give the lawyers for Timothy McVeigh, the Oklahoma bomber, hundreds of FBI documents on discovery,[639]a review of the treatment of aliens held on immigration charges after the September 11 attacks,[640] and an examination of FBI efforts to improve the sharing of intelligence and other information.[641] It should also be noted that the recently released *9/11 Commission Report* relied on the Department of

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[633] *Ibid.* at 13-14.
[634] *Ibid.* at 12-13.
[635] U.S., Department of Justice, Office of the Inspector General, *A Review of the FBI's Performance in Uncovering the Espionage Activities of Aldrich Hazen Ames* (April 1997), online: Department of Justice, http://www.usdoj.gov/oig/special/9704.htm.
[636] U.S., Department of Justice, Office of the Inspector General, *A Review of the FBI's Performance in Deterring, Detecting, and Investigating the Espionage Activities of Robert Philip Hanssen* (August, 2003), online: Department of Justice, http://www.usdoj.gov/oig/special/0308/index.htm.
[637] U.S., Department of Justice, Office of the Inspector General, *The Handling of FBI Intelligence Information Related to the Justice Department's Campaign Finance Investigation* (July, 1999), Department of Justice, http://www.usdoj.gov/oig/special/9907.htm.
[638] U.S., Department of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (April 1997), http://www.usdoj.gov/oig/special/9704a/index.htm.
[639] U.S., Department of Justice, Office of the Inspector General, *An Investigation of the Belated Production of Documents in the Oklahoma City Bombing Case* (March, 2002), http://www.usdoj.gov/oig/special/0203/index.htm.
[640] U.S., Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11Attacks* (June 2003), http://www.usdoj.gov/oig/special/0306/index.htm.
[641] U.S., Department of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Efforts to Improve the Sharing of Intelligence and Other Information* (December, 2003), http://www.usdoj.gov/oig/audit/FBI/0410/index.htm.

Justice Inspector General's reports on the FBI for conducting its assessment of the Bureau's intelligence capabilities.[642]

Inspectors General can be requested by Congress to conduct investigations. The Joint Congressional Inquiry into 9/11 that reported in December 2002, for example, requested that Inspectors General of the relevant departments and agencies 'conduct investigations and reviews as necessary to determine whether and to what extent personnel at all levels should be held accountable for any omission, commission, or failure to meet professional standards in regard to the identification, prevention, or disruption of terrorist attacks, including the events of September 11, 2001.'[643]

Former US Attorney General Griffin Bell and former Deputy Attorney General Lee Colwell were recently appointed by the Director of the FBI to conduct a study of the Office of Professional Responsibility (OPR) of the FBI. Their report of February 2004 stated: 'One of the most significant reasons advanced for creation of DOJ/OIG oversight was the need to ensure integrity within FBI's disciplinary process through outside supervision. While this oversight function remains controversial and has been criticized as an unnecessary intrusion into FBI internal affairs, the Commission considers it appropriate to note that, according to some interviewees, this structure has improved the credibility of the FBI's disciplinary process.'[644] The Bell and Colwell report was strongly critical of the operation of the FBI's OPR and recommended the introduction of a number of measures 'intended to address OPR's poor reputation and inefficiency.'[645]

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[642] U.S., National Commission on Terrorist Attacks upon the United States, *Staff Statement No. 12: Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States* (April 14, 2004) at 4.

[643] U.S., Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, *Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence* (S. Rep. No. 107-351; H.R. Rep. No. 107-792) (December 2002) at 15-16.

[644] Griffin B. Bell and Lee Colwell, *Study of the FBI's Office of Professional Responsibility* (February 2004) at 13.

[645] *Ibid.* at 1.

Although some have suggested setting up a separate Inspector General office in the FBI,[646] the Inspector General of the Department of Justice has continued its responsibility over the FBI. In 2002, legislation required that the Inspector General direct that one 'official from the office of the Inspector General be responsible for supervising and coordinating independent oversight of programs and operations' of the FBI until September 30, 2004.[647] The Inspector has a budget of about $60 million (US) and employs about 400 persons.[648]

The *USA PATRIOT Act* of 2001 expanded the powers of the FBI and other agencies involved in national security.[649] Section 1001 of the *PATRIOT Act* directed the Inspector General of the Department of Justice to designate an official in the Inspector's office to 'review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice,' to publicize the responsibility and functioning of the official, and to submit semi-annual reports to the Congressional judiciary committees. The FBI is covered by the section.[650] The reports set out some of the complaints investigated by the Inspector General.[651] Allegations include such matters as illegal searches and fabrication of evidence by FBI agents, the failure of the FBI to initiate investigations, and improper targeting of 'certain ethnic and religious groups who would be vulnerable to abuse due to a possible backlash from the terrorist attacks of September 11, 2001.'[652] For the six-month period ending in December 2003 the office received over a thousand complaints, but only 17 of those complaints resulted in an investigation or closer review by the Inspector General or one of the internal affairs offices in the various agencies.[653]

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[646] U.S., *Restoring Confidence in the FBI: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (June 20, 2001) at 8 (Michael R. Bromwich).
[647] *21st Century Department of Justice Appropriations Authorization Act*, §309, 5 U.S.C. App. 3 §8E(b)(2) (2002).
[648] U.S. Department of Justice, Office of the Inspector General, *Semiannual Report to Congress: October 1, 2003 – March 31, 2004* (2004) at 5-6.
[649] Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (New York: The Century Foundation Press, 2002) at 1.
[650] *USA PATRIOT Act*, Pub. L. No. 107-56, 115 Stat. 272 at §1001 (2001).
[651] U.S. Department of Justice, Office of the Inspector General, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* (January 27, 2004).
[652] *Ibid.* at 3-5.
[653] *Ibid.* at 4-5.

In general, the Department of Justice Inspector General 'may initiate, conduct and supervise such audits and investigations...as the Inspector General considers appropriate.'[654] They can, of course, do so without waiting for a complaint. Department heads cannot 'prevent or prohibit' Inspectors General from carrying out these activities or from issuing subpoenas,[655] but with respect to the Inspector General for the Department of Justice, the Inspector General Act of 1978 specifically provides that the Inspector 'shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning ... intelligence or counterintelligence matters; or ... other matters the disclosure of which would constitute a serious threat to national security.'[656]

Congressional Oversight of the FBI

The United States Congress plays a more active role in overseeing the activities of the intelligence community than does the Canadian Parliament.[657] It has greater responsibility for authorization and appropriation of department and agency budgets than does Parliament,[658] where a majority government will almost always prevail in setting the budget. One writer examining Congressional oversight writes: 'Control over the budget...is the most fundamental lever of congressional oversight.'[659] Congress' permanent select committees on intelligence and its committees on the judiciary authorize expenditures and Congress' appropriation committees allocate the specific amounts.[660] Further, Congress approves key executive appointments, which are normally the exclusive prerogative of the Cabinet in Canada. The directors of the CIA and the FBI are appointed by the President, with the 'advice and consent' of the Senate.[661] In one respect, however, the Canadian Parliament plays as active a role as Congress, that is, in

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[654] *Inspector General Act of 1978*, Pub. L. 95-452, §8E(b)(1), 92 Stat. 1101.
[655] *Inspector General Act of 1978*, Pub. L. 95-452, §3(a), 92 Stat. 1101.
[656] *Inspector General Act of 1978*, Pub. L. 95-452, §8E(a)(1), 92 Stat. 1101.
[657] See generally, Department of Public Safety and Emergency Preparedness Canada, *A Consultation Paper to Help Inform the Creation of a Committee of Parliamentarians to Review National Security* (Ottawa, March 31, 2004), http://www.psepc-sppcc.gc.ca/publications/national_security/nat_sec_cmte_e.asp.
[658] Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington, D.C.: CQ Press, 2003) at 156.
[659] *Ibid.*
[660] *Ibid.* at 156-157.
[661] *Ibid.* at 158-159.

its audit function. Like the Auditor General of Canada, who reports directly to Parliament, the United States General Accounting Office (GAO) is the audit, evaluation and investigative branch of Congress. Investigations of and reports on the FBI by the GAO have included a prescient report in July 2001, entitled 'FBI Intelligence Investigations: Coordination within Justice on Counterintelligence Criminal Matters is Limited'[662] A report from March 2004 is entitled 'FBI Transformation: FBI Continues to Make Progress in its Efforts to Transform and Address Priorities.'[663]

In the mid 1970s Congress became more involved in the activities of the intelligence community. Although there had been and continues to be a standing judiciary committee in the House and the Senate, there was no standing committee for intelligence. There was 'fairly lax and distant congressional oversight' of intelligence.[664] The revelations of the Senate's Church committee and the House's Pike committee had shown that greater oversight was required.[665] The Senate set up a permanent select committee in 1976, the Senate Select Committee on Intelligence,[666] and the following year the House set up the House Permanent Select Committee on Intelligence.[667]

The foundational Act on national security, the *National Security Act of 1947*, was amended to set out the responsibilities and powers of these committees. The terms of the committee members were limited – eight years for senators and six for members of the House – to prevent the members from being too easily co-opted by the intelligence agencies. There have been various suggestions that these limits be changed because they

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[662] U.S., General Accounting Office, *FBI Intelligence Investigations: Coordination within Justice on Counterintelligence Criminal Matters is Limited* (GAO-01-780), (July, 2001), www.fas.org/irp/gao/d01780.pdf .

[663] U.S., General Accounting Office, *FBI Transformation: FBI Continues to Make Progress in its Efforts to Transform and Address Priorities* (GAO-04-578T), (March 23, 2004), www.gao.gov/new.items/d04578t.pdf .

[664] Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington, D.C.: CQ Press, 2003) at 161.

[665] Marvin C. Ott, "Partisanship and the Decline of Intelligence Oversight" (2003) 16 *International Journal of Intelligence and CounterIntelligence* 69 at 74-75; Athan G. Theoharis, ed., *The FBI: A Comprehensive Reference Guide* (Phoenix: Oryx Press, 1999) at 129.

[666] U.S., S. Res. 400, *A Resolution to Establish a Standing Committee of the Senate on Intelligence Activities*, 94th Congress, 1976.

[667] U.S., H.R. Res. 658, *Resolution to Amend the Rules of the House of Representatives and Establish a Permanent Select Committee on Intelligence*, 95th Congress, 1977.

prevent the buildup of expertise in the committee.[668] There are no such limits for the judiciary committees. The committees are bipartisan. The majority party in the Senate has a one-seat advantage on the 17-member Senate committee and the 20-member House committee is allocated proportionately according to the representation of the parties in the House.[669] There is coordination with other committees. The Senate committee, for example, provides for two members from the Judiciary Committee, two members from the Appropriation Committee, and members from other committees.[670]

Under the current structure, various semi-annual and annual reports must be sent to the Congressional committees, including reports from the Inspectors General of the intelligence community.[671] The committees can conduct investigations, issue subpoenas and take testimony under oath.[672] There are procedures for handling classified or sensitive material[673] and staff will be cleared for security.[674] Members of Congress are not cleared, even though they have access to classified material.[675] Most of the committees' activities involve after the fact investigations, but with respect to certain proposed covert actions the President is required to report the proposed action to the committees before initiating action. Section 501 of the *National Security Act* states: 'The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.'[676] In 'extraordinary circumstances affecting vital interests of the United States,' the President can limit access

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[668] Marvin C. Ott, "Partisanship and the Decline of Intelligence Oversight" (2003,) 16 *International Journal of Intelligence and CounterIntelligence* 69 at 87; U.S., Congressional Research Service, *FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress* (RL 32336) (The Library of Congress, April 6, 2004) at 37.
[669] Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington, D.C.: CQ Press, 2003) at 169.
[670] U.S., S. Res. 400, *A Resolution to Establish a Standing Committee of the Senate on Intelligence Activities*, 94th Congress, 1976, s. 2(a)(1).
[671] *National Security Act of 1947*, 50 U.S.C. §507(a)(E).
[672] See, U.S., Senate Select Committee on Intelligence, *Rules of the Select Committee on Intelligence* (February 25, 2003), Rules 6-8.
[673] *Ibid.* Rule 9.
[674] *Ibid.* Rule 10.1.
[675] Lowenthal, *Intelligence: From Secrets to Policy* at 162
[676] *National Security Act of 1947*, 50 U.S.C. §413(a)(1) (1947).

to the chair and ranking minority member of the congressional intelligence committees and the majority and minority congressional leaders.[677]

Concerns have been expressed that the committees have engaged in partisan politics[678] and there have been a number of suggestions for change, including combining the two Congressional committees.[679] The 2002 inquiry into the terrorist attack of September 11, 2001 was done by a joint committee of the two intelligence committees.[680] The Joint Committee made a number of recommendations, including – with respect to the FBI – creating a statutory Director of National Intelligence with overall responsibility for the intelligence community, maximizing the exchange of counterterrorism information with other intelligence agencies, and considering the creation of an independent domestic intelligence service.[681] In February 2003, a bill was introduced in the Senate by Senator John Edwards to remove domestic and counterintelligence functions from the FBI and to place them in a new, separate agency, the Homeland Intelligence Agency, to be housed in the Department of Homeland Security. There would be an Inspector General for the new agency as well as an Office of Privacy and Civil Liberties Protection. The bill was referred to the Senate Select Committee on Intelligence.[682]

The *9/11 Commission Report* strongly criticized the current state of Congressional oversight, stating: 'Under the terms of existing rules and resolutions the House and Senate intelligence committees lack the power, influence, and sustained capability' to meet future challenges.[683] 'Congressional oversight for intelligence – and counterterrorism,' the Commission concluded, 'is now dysfunctional.'[684] The

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[677] *National Security Act of 1947*, 50 U.S.C. §413b-(c)(1) and (c)(2) (1947).
[678] Marvin C. Ott, "Partisanship and the Decline of Intelligence Oversight" (2003), 16 *International Journal of Intelligence and CounterIntelligence* 69 at 85-88.
[679] Frank J. Smist, *Congress Oversees the United States Intelligence Community 1947-1994* (2d ed.) (Knoxville: U. of Tennessee Press, 1994) at 313.
[680] U.S., Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, *Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence* (S. Rep. No. 107-351; H.R. Rep. No. 107-792) (December 2002).
[681] *Ibid.* at 2-9.
[682] U.S., Bill S. 410, *Foreign Intelligence Collection Improvement Act of 2003*, 108th Congress, 2003 (pending).
[683] *The 9/11 Commission Report* at 420.
[684] *Ibid.*

Commission recommended changes, including the possible creation of a joint congressional committee on intelligence or a single committee on intelligence in each house; the creation of a subcommittee specifically dedicated to oversight; allowing members to serve indefinitely; and, a smaller membership with a party distribution similar to the current Senate committee structure.[685]

c. Central Intelligence Agency

As with the FBI, the two principal mechanisms for accountability of the Central Intelligence Agency (CIA) are the Office of the Inspector General and Congressional oversight.

The CIA has had some form of an Inspector General since 1952, but this was not created by statute. The Inspector General, who was always a senior CIA official, was appointed by the Director of the CIA, and in the non-statutory scheme had a staff drawn from the organization.[686] A commission headed by Vice-President Nelson Rockefeller, which reported on domestic activities of the CIA in 1975, found that there were only five professionals on the IG's staff.[687] A year later, the Church committee found that the Inspector General had not been given vital information, that its reports were being ignored, and that it was not making reports of suspected illegalities to the Attorney General.[688] Various recommendations for change were made by the Church and the Pike commissions, but it was not until after the CIA's role in the arms sales to Iran and the less-than-vigorous report by the Inspector General came to light in 1986 that steps were begun to bring in a statutory IG under the 1978 Inspector General Act.[689]

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[685] *Ibid.* at 420-421.
[686] Arthur S. Hulnick, *Fixing the Spy Machine: Preparing American Intelligence for the Twenty-First Century* (Westport, Conn.: Praeger, 1999) at 140.
[687] L. Britt Snider, "Creating a Statutory Inspector General at the CIA" (2001), 10 *Studies in Intelligence* 15.
[688] *Ibid.* at 15-16.
[689] *Ibid.* at 16.

A statutory Inspector General for the CIA was created in 1989 by amendments to the *Central Intelligence Agency Act*, modeled on the 1978 *Inspector General Act*.[690] The legislation allowed the CIA director to prohibit the IG from undertaking a particular investigation, audit, or inspection in order to protect sensitive information.[691] The first Inspector General, Frederick Hitz, served for seven and a half years, but during his tenure the Director of the CIA never invoked the powers provided by the 1989 Act to curtail his activities.[692] The Inspector General has conducted investigations into the espionage case of Aldrich Ames in 1994[693] and the following year into the CIA's activities in Guatemala.[694] In 1998, it concluded a report on 'Investigation of Allegations Concerning Connections between CIA and the Contras in Cocaine Trafficking to the United States.'[695]

The two permanent Congressional oversight committees have overseen the work of the CIA since they were established in the 1970s. The two Intelligence Committees have sole jurisdiction for overseeing the CIA's activities. Since 1974, the Executive has been obligated to report any covert action to the Intelligence Committees.[696] The current requirement is for the President to authorize the action in writing and in pursuit of 'identifiable foreign policy objectives.'[697] While Congress does not have a veto power for covert actions, they are able to withhold funding for the operation through the budget authorization and appropriation power.[698]

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[690] *Central Intelligence Agency Act of 1949*, 50 U.S.C. §403q. See Snider, "Creating a Statutory Inspector General at the CIA" at 15.
[691] *Central Intelligence Agency Act of 1949*, 50 U.S.C. §403q-(b)(3).
[692] Snider, "Creating a Statutory Inspector General at the CIA" at 20.
[693] U.S., Central Intelligence Agency, Office of the Inspector General, "The Aldrich H. Ames Case: An Assessment of CIA's Role in Identifying Ames as an Intelligence Penetration of the Agency," (October 21, 1994), http://www.loyola.edu/dept/politics/intel/hitzrept.html.
[694] Frederick P. Hitz, "Not Just Another Day at the Office: The Unique Business of the CIA Inspector General," [1996] *The Journal of Public Inquiry* 15 at 17.
[695] U.S., Central Intelligence Agency, Office of the Inspector General, "Report of Investigation of Allegations Concerning Connections Between CIA and the Contras in Cocaine Trafficking to the United States", (96-0143-IG), (January 29, 1998), http://www.cia.gov/cia/reports/cocaine/overview/index.html.
[696] *National Security Act of 1947*, 50 U.S.C. §413b; See William J. Daugherty, "Approval and Review of Covert Action Programs Since Reagan" (2004), 17 *International Journal of Intelligence and Counterintelligence* 62 at 63.
[697] *National Security Act of 1947*, 50 U.S.C. §413b-(a)(1).
[698] William J. Daugherty, "Approval and Review of Covert Action Programs Since Reagan" at 64.

The criticism of the Congressional oversight committees by the 9/11 Commission, outlined at the end of the last section, was directed at both the committees looking at the FBI and the committees overseeing the CIA.[699]

d. National Security Agency

The mission of the National Security Agency (NSA), in the words of its official web site, 'is to intercept and analyze foreign adversaries' communications signals.'[700] The agency is the responsibility of the Department of Defense. It was created by President Truman in a secret memorandum in 1952,[701] and, like other intelligence agencies in the United States, was criticized by the Congressional Church and Pike commissions in the mid 1970s.[702] The Church committee described the functions of the agency and concluded: 'The Committee regards these functions as vital to American security. NSA's capability to perform these functions must be preserved. The Committee notes that despite the fact that NSA has been in existence for several decades, NSA still lacks a legislative charter. Moreover, in its extensive investigation, the Committee has identified intelligence community abuses in levying requirements on NSA and abuses by NSA itself in carrying out its functions.'[703]

As a result of the Congressional investigations, the two previously described intelligence committees of Congress were formed which have taken an increasing interest in the work of the NSA.[704] A recent report on the agency by the Congressional Research Service states: 'Members and staff [of the committees] have regularly reviewed NSA programs and adjusted budgetary priorities with almost all hearings being conducted in closed sessions...The two armed services committees also have oversight of most intelligence programs since they involve Defense Department assets.'[705]

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[699] *The 9/11 Commission Report* at 419-421.
[700] U.S., National Security Agency, "Frequently Asked Questions", www.nsa.gov/about/about00020.cfm at 1.
[701] U.S., Congressional Research Service, *The National Security Agency: Issues for Congress* (RL 30740) (Library of Congress, January 16, 2001) at 16.
[702] *Ibid.* at 17-19.
[703] *Ibid.* at 18.
[704] *Ibid.* at 22.
[705] *Ibid.* at 22.

The Church and Pike committees had recommended that the work of the NSA be recognized by specific legislation.[706] Although there had been legislation passed in 1959 dealing with such matters as the personnel policies of the organization[707] and there had been a number of executive orders setting out guidance for the NSA,[708] it was not until 1992 that the National Security Act was amended to provide a functional charter for the organization.[709] The Secretary of Defense, the Act states, has the responsibility to ensure 'through the National Security Agency (except as otherwise directed by the President or the National Security Council), the continued operation of an effective unified organization for the conduct of signals intelligence activities and shall ensure that the product is disseminated in a timely manner to authorized recipients.'[710] As the Congressional Research Service points out in its 2001 report: 'Until very recently NSA was the most secretive intelligence agency, more shielded from public scrutiny than the Central Intelligence Agency.'[711] This, of course, is similar to the secrecy until recently of the comparable Canadian signals intelligence agency, the Communications Security Establishment.

Another result of the Church and Pike reports was that Congress passed the Foreign Intelligence Surveillance Act in 1978.[712] This Act established procedures for electronic surveillance in the United States for foreign intelligence purposes. Targeting of the communications of foreign powers required the authorization of the Attorney General, and the targeting of the communications of US persons required court approval.[713] The *USA PATRIOT Act* expanded the range of surveillance that can now be done under the Act and the uses to which that information can be put. The pendulum has swung from the

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[706] *Ibid.* at 18-19.
[707] *National Security Agency Act of 1959*, Pub. L. No. 86-36, 73 Stat. 63.
[708] U.S., Congressional Research Service, *The National Security Agency: Issues for Congress* at 20.
[709] *National Security Act of 1947*, 50 U.S.C. at §403-5.
[710] *Ibid.* at §403-5(b)(1).
[711] U.S., Congressional Research Service, *The National Security Agency: Issues for Congress* at 2.
[712] *Foreign Intelligence Surveillance Act of 1978*, 50 U.S.C. 1801; U.S., Congressional Research Service, *The National Security Agency: Issues for Congress* at 19; Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (New York: The Century Foundation Press, 2002) at 37-38.
[713] U.S., Congressional Research Service, *The National Security Agency: Issues for Congress* at 19.

tight control imposed in the 1970s, and even reluctance by the agencies to use wiretapping and similar forms of surveillance for national security purposes, to their more widespread use.[714] Recently, the *9/11 Commission Report* recommended that there be a 'full and informed debate' on the *PATRIOT Act* and that if a power is retained that there should be 'adequate supervision of the executive's use of the powers to ensure protection of civil liberties.'[715]

As with other intelligence agencies, Inspectors General have been introduced. There is a Department of Defense Inspector General that was added to the Inspector General Act in 1988 and which has authority over the NSA.[716] The Inspector cannot be in the military.[717] In 1991, the Office conducted the first comprehensive inspection of the NSA. The goal of the inspection, an IG report states, 'was to evaluate the processes the NSA uses to measure achievement of its mission and to manage its functions and organizational elements.'[718] The report found that 'NSA did not have sufficient oversight mechanisms to ensure the Agency efficiently accomplished its mission.'[719] A 1996 audit by the Defense Department's Inspector General found 'glaring management and accounting deficiencies.'[720] There is also a non-statutory internal Inspector General within the NSA. The Office of the Inspector General is, however, drawn from the NSA itself and so lacks the independence of an outside appointment. A 1996 report by the Department of Defense Inspector General noted that the NSA Inspector General and the entire inspection staff are rotational positions and went on to state: 'We remain concerned that

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[714] Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (New York: The Century Foundation Press, 2002) at 38-39; U.S., National Commission on Terrorist Attacks Upon the United States, *Staff Statement No. 12: Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States* (April 14, 2004) at 3.
[715] *9/11 Commission Report* at 394-395.
[716] *Inspector General Act of 1978*, Pub. L. 95-452, §8, 92 Stat. 1101.
[717] *Ibid.* §8(a).
[718] U.S., Department of Defense, Office of the Inspector General, *Final Report on the Verification Inspection of the National Security Agency* (IR 96-03), (February 13, 1996) at 2.
[719] Matthew M. Aid, "The Time of Troubles: The US National Security Agency in the Twenty-First Century" (2000), 15 *Intelligence and National Security* 1 at 7.
[720] *Ibid.* at 9; U.S., Department of Defense, Office of the Inspector General, *Final Report on the Verification Inspection of the National Security Agency*.

independence cannot be assured under this arrangement because these individuals must consider the impact of their work on prospects for future assignments."[721]

[721] U.S., Department of Defense, Office of the Inspector General, *Final Report on the Verification Inspection of the National Security Agency* at 39.